ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, DC
April 24, 2018

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Meeting of the Advisory Committee on Criminal Rules
April 24, 2018
Washington, DC

I. OPENING BUSINESS

A. Chair's remarks and administrative announcements

B. Review and approval of minutes of October 2017 meeting in Chicago, IL

C. Report of the Rules Committee Staff

1. Report on the January 2018 meeting of the Committee on Rules of Practice and Procedure

2. Report on the March 2018 session of the Judicial Conference of the United States

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II. ACTION ITEM: RULE 16.1 – PRETRIAL DISCOVERY CONFERENCE

A. Reporters' memo and summary of public comments

B. Proposed Rule 16.1

III. ACTION ITEM: RULES 5 OF THE RULES GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255

A. Reporters' memo and summary of public comments

B. Proposed Rules

- Rule 5(e) of the Rules Governing § 2254 Cases
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IV. RULE 32(e)(2) – DISCLOSURE OF PSR TO THE DEFENDANT

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- Suggestion 17-CR-C (Hon. Donald W. Molloy)
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V. RULE 16 – PRETRIAL DISCLOSURE OF EXPERT TESTIMONY

A. Reporters' memo

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- Suggestion 17-CR-B (Hon. Jed S. Rakoff)
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A. Reporters' memo

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A. Reporters' memo

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IX. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

- Fall meeting: October 10, 2018, Nashville, TN

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James C. Dever III	D	North Carolina (Eastern)		2014	2020
Donna Lee Elm	FPD	Florida (Middle)		2017	2020
Gary Feinerman	D	Illinois (Northern)		2014	2020
Mark Filip	ESQ	Illinois		2013	2018
Denise Paige Hood	D	Michigan (Eastern)		2015	2018
Lewis A. Kaplan	D	New York (Southern)		2015	2018
Orin S. Kerr	ACAD	Washington, DC		2013	2019
Raymond M. Kethledge	C	Sixth Circuit		2013	2019
Joan L. Larsen	JUST	Michigan		2016	2019
Bruce J. McGiverin	M	Puerto Rico		2017	2020
John S. Siffert	ESQ	New York		2012	2018
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open
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	Judge Pamela Pepper	***(Bankruptcy)***
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	Judge A. Benjamin Goldgar	***(Bankruptcy)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
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TAB 1

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TAB 1A

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TAB 1B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 24, 2017, Chicago, Illinois

I. ATTENDANCE

The Criminal Rules Advisory Committee ("Committee") met in Chicago, Illinois, on October 24, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Judge James C. Dever III
Donna Lee Elm, Esq.
Judge Gary Feinerman
Mark Filip, Esq.
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Justice Joan L. Larsen
Judge Bruce McGivern
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge David G. Campbell, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Daniel Coquillette, Standing Committee Reporter (by telephone)
Professor Catherine T. Struve, Associate Reporter, Standing Committee (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Chief Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Federal Judicial Center
Julie Wilson, Esq., Rules Committee Staff
Patrick Tighe, Esq., Law Clerk, Standing Committee
Shelly Cox, Rules Committee Staff

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy thanked the staff for arranging the meeting, then welcomed Judge David Campbell, the Chair of the Standing Committee, and two new members of the committee: Federal Defender Donna Lee Elm and Magistrate Judge Bruce McGivern.

Judge Molloy also recognized two guests who were asked to introduce themselves: Catherine M. Recker, representing the American College of Trial Lawyers, and Professor Daniel S. McConkie, who had submitted a written statement on the proposed amendment creating Rule 16.1.

B. Approval of Draft Minutes

Discussion identified several typographical errors in the minutes of the Committee's Spring meeting. The Committee voted to approve the draft minutes with the proviso that the reporters would correct any errors noted by members or identified by the reporters.

C. Status of Rules Amendments and Pending Legislation

Ms. Womeldorf reported on the status of the proposed amendments to Rules 12.4, 49, and 45. The Judicial Conference met in September and approved those Rules, which have been transmitted to the Supreme Court. If transmitted by the Court to Congress by May 1, 2018, the Rules would become effective in December 1, 2018, absent Congressional action.

Ms. Wilson discussed the chart at Tab 1D, which included pending legislation that would directly amend the Federal Rules. She said there had been no further action on the proposals to repeal the amendments to Rule 41 and also mentioned the "Back the Blue Act," which would amend Rule 11 of the 2254 Rules. This legislation is being monitored.

The chart also included legislation that would not directly amend the rules but would require some clarification after passage. The Safe at Home Act, which involves programs by states providing a designated address for use instead of the person's actual physical address, would require courts to accept the designated addresses for litigation, mail, and service. The "Article I Amicus and Intervention Act" would potentially limit or deny the House of Representative's ability to appear as an amicus or intervene in pending cases. Although there is no intent to circumvent the Rules Enabling Act, the bill raises drafting issues that could potentially work to enlarge the appeal time. The Administrative Office is communicating with staffers on the Hill, and will continue to monitor all of this legislation.

Discussion focused on the bills to repeal the amendments to Rule 41. The chart in the agenda book lists bill numbers and sponsors. In response to questions about the Department's experience in using the new provisions, Mr. Wroblewski noted that Rule 41(b)(6)(B) had been employed in a case involving a large botnet, and that the use of the new authority under the

amended rule is becoming fairly routine. To his knowledge, the new provisions have not yet been challenged in court.

II. COOPERATORS SUBCOMMITTEE REPORT

A. Background

Judge Molloy reminded the Committee of its charge from the Standing Committee: (1) to draft the Rules necessary to implement the changes recommended by CACM, and (2) to advise the Standing Committee whether those Rules should be adopted. Judge Campbell agreed and commented on the schedule going forward. The Committee's final recommendations are not needed until the Standing Committee's June meeting. It would, however, be very useful to provide the Standing Committee with a sense of the Committee's thinking at the January meeting, and allow the Standing Committee to provide feedback. After thanking the reporters and the members of the Cooperators Subcommittee for their work, Judge Molloy turned the discussion over to the Cooperators Subcommittee Chair Judge Lewis Kaplan, who is also chairing the Cooperator Task Force (TF).

Judge Kaplan stated that the Subcommittee had completed its work on drafting a slate of draft amendments that would be necessary to implement the CACM Guidance. The Subcommittee has also been working on a proposal to limit remote access; this proposal is not yet in final form, but the Subcommittee is seeking input from the Committee at this meeting. He noted the limited remote access approach is not a CACM proposal.

Judge Kaplan noted that the TF is not as far along as the Subcommittee, which has a much narrower focus. The TF has a Bureau of Prisons (BOP)/Marshals Service working group (chaired by Judge St. Eve). This working group has made terrific progress, and it expects to make final recommendations to the TF for changes at the BOP. He noted that the proposed changes to BOP procedures and practices, by themselves, would be a major step forward, because the most serious manifestations of the problem occur in BOP facilities. The TF also has a CM/ECF working group (chaired by Judge Philip Martinez), which is working to identify options for changing the CM/ECF system to make an individual's cooperation less readily apparent than it is now in many districts on CM/ECF. The CM/ECF working group has tentatively identified for more careful consideration one option that overlaps in part with an approach the Subcommittee has been considering for some time.

Turning to the work of the Subcommittee, Judge Kaplan praised the reporters for their outstanding work, as well as the members of the Subcommittee, all of whom worked very hard on this problem. He reported that the Subcommittee began by comparing drafts of three different rules-based approaches to the cooperator problem. The first approach responded to the Standing Committee's charge to draft rules that would implement the CACM Guidance. The second option was to route most of the documents concerning cooperation to the presentence report (PSR), taking advantage of the traditional privacy accorded PSR to respond to First Amendment issues and other concerns that might be raised by the CACM approach. After receiving input from the TF, the Subcommittee decided not to move forward with that option. It would have

significantly changed the character of the PSR, put the Probation Officers in an uncomfortable role, and required the insertion of materials created long after the preparation of the PSR. That option is off the table. The remaining option (discussed later) is limiting remote access.

B. Discussion of Rules implementing the CACM Guidance

Judge Kaplan then turned the Committee's attention to the amendments implementing the CACM Guidance. He noted the Subcommittee unanimously agreed that its draft amendments to Rules 11(c)(2) and (3), 11(g), 32(g), 32(i), and 35(b) would fully implement the CACM Guidance. Additionally, the Subcommittee developed other options, which are shown in Appendix A, Tab 2A. The first column shows the draft amendments implementing the CACM Guidance, and the other columns show variations on what CACM proposed. The Subcommittee also identified other documents and events not covered by the CACM Guidance that could reveal information concerning cooperation, and it drafted additional amendments that would plug these holes in the approach CACM is advocating. Those amendments are in Tab 2B.

After a great deal of deliberation, the Subcommittee concluded, without dissent, that it was not prepared to recommend the adoption of any of these rules changes. The reasons for that recommendation, Judge Kaplan explained, are well stated in the reporters' memoranda in the agenda book, especially the memorandum at Tab 2B. He mentioned a few highlights.

Judge Kaplan explained that the Subcommittee was quite negative on the CACM proposal that would have changed plea and sentencing procedures in the courtroom, requiring bench conferences in every case. The TF generally had the same view on this point. He noted a series of objections. First, these bench conferences would not prevent observers in the courtroom—whom no one is proposing to exclude—from determining who is and is not cooperating. The parties' body language would be different and the bench conferences would be longer when there was a discussion of actual cooperation, as compared to a brief statement there was no cooperation in this case. A second concern was that the defendant's right to be present at sentencing would create security issues for these bench conferences. Some members also took the view that especially at sentencing, channeling all discussion of cooperation to a bench conference would impair the defense, breaking up and interrupting the presentation counsel would otherwise make. There was also a concern that these conferences would be unnecessarily time consuming and burdensome. And what about the public's right of access and the First Amendment? For all of these reasons, the Subcommittee rejected this approach without exception.

Judge Kaplan then turned to the third approach considered by the Subcommittee: limiting remote access. The Subcommittee's draft of a proposed Rule 49.2, p. 157 of the agenda book, is a work in progress. The concept is to limit remote access but allow anyone who visits the courthouse and shows identification to see any unsealed portion of the file in a criminal case. This approach is being followed now in at least two districts. The Subcommittee's working draft allows the parties and their attorneys to have remote electronic access to any part of the file that is not sealed or restricted as to that party. There is bracketed language about codefendants. The Subcommittee has wrestled with the proper approach to access by other attorneys. This draft

(which the Subcommittee has not adopted), allows any attorney with ECF registration to have remote access to any part of the file that is not sealed or restricted, and it gives the public remote access to the indictment, docket, and judicial orders, paralleling Civil Rule 5.2(c)(2).

Judge Kaplan noted that the Subcommittee had not resolved which attorneys should get full remote access. Should it be only the attorney for the party, all attorneys who appear in the case, all attorneys who are counsel of record in some criminal cases, all attorneys who have CM/ECF registration, or all attorneys period? This is a very difficult problem. It raises the issue how far we can trust attorneys not to give cooperation information to their clients.

At its last meeting, the Subcommittee ultimately decided to put Rule 49.2 on the back burner because the TF's CM/ECF working group is developing an option with common elements. The lead option under consideration by the CM/ECF working group is something called the plea and sentencing folder (PSF) approach, which resembles the procedure used in the District of Arizona. Judge Kaplan described the current form of that proposal. There would be a PSF on the docket in every criminal case. The existence of the folder would show up on PACER, but its contents would not be listed or available on PACER. Admitted attorneys, including attorneys not involved in the case in question, could see the contents of the folder. Further, an individual judge or a district by local rule could require that particular documents or categories of documents in the folder be sealed or otherwise restricted so that an attorney without access to that restricted or sealed document could not discern its existence or open it. It is technically feasible to create a PSF, because the District of Arizona is now doing something similar, but we do not yet know whether the rest of the mechanics are within the current capabilities of the CM/ECF system.

Judge Kaplan noted that the variation permitted in CM/ECF working group's current proposal—allowing each district or each judge to make its own decision about which documents to seal, and which attorneys would get access—meant there would be no uniform national procedure. In contrast, Rule 49.2, if adopted, would create a uniform national approach.

Judge Kaplan said the TF working group had not yet focused on access by the press. Although procedures define the press for purposes of access to the Supreme Court and other proceedings, in the contemporary world any rules governing press access would have to consider how to treat not only traditional press outlets, but also individual bloggers.

Judge Kaplan concluded by stating several questions on which he hoped there would be discussion. First, does the Committee agree that the draft amendments would implement the CACM recommendation? Second, does the Committee endorse the Subcommittee's recommendation not to support any of the amendments that would implement the CACM Guidance? Finally, what are the Committee's thoughts about limiting remote public access?

At Judge Molloy's request, Professors Beale and King walked the Committee through the alternative approaches. The amendments implementing the CACM Guidance appear first on pages 153-55, and then again in the first column of the comparison chart beginning on page 199. These rules are the final version of the Subcommittee's best effort to implement exactly what

CACM recommended. The second column, beginning on page 199, omits the courtroom rules requiring bench conferences in every case at the plea and sentencing phase. The third column substitutes sealing of the whole document instead of dividing them into two different documents. The fourth column follows the practice in some districts, including the Southern District of New York, of tendering these documents to the court but not filing them. Judge Kaplan explained that in the Southern District those documents are retained by the U.S. Attorney's Office as exhibits. The reporters noted that all of these rules say sealing is indefinite, implementing CACM's policy of overriding local rules that say sealed documents must be unsealed after a certain period of time.

Rule 11(c). Professor Beale noted that although the CACM Guidance did not explicitly state that all plea agreements should be filed, the Subcommittee assumed that such a national policy was implicit in the CACM Guidance, and it is reflected in the proposed amendment to Rule 11 in columns 1, 2, and 3. Column 4 shows the no filing approach, and does not include this proposed provision.

Rule 11(g). Judge Campbell noted that column 3 should reference the whole plea proceeding because there is no bench conference. The reporters agreed with this correction.

Members discussed the question whether the provision on permanent sealing would conflict with Circuit rules. For example, when a case goes to the Ninth Circuit, the record is unsealed unless there is a showing of good cause that it should remain sealed. Members noted variations in other circuits. Judge Campbell commented that if the Committee were to go forward with rules requiring permanent sealing, the Appellate Rules Committee should consider whether any changes would be needed to avoid a conflict.

A member who stated that he was generally against sealing observed that draft rules would at least require the courts of appeals to do a case-by-case analysis on the question whether something should remain sealed. The reporters responded that CACM's approach would reverse the current presumption: the parties would have to make the showing to unseal.

Rule 32. Rule 32(i) in column 1 implements the CACM requirement of a bench conference in every sentencing proceeding, and 32(g)(2) requires all sentencing memoranda to have a public part and a sealed supplement. Column 3 seals entire memorandum, and in the fourth column the sentencing memorandum is submitted directly to the judge and is not filed.

Rule 35. The amendment in column 1 seals all Rule 35 motions. For the no filing option, Rule 49, which governs motions, would be amended. On page 206, language is added to Rule 49 requiring any motion for sentencing reduction under Rule 35, 18 U.S.C. § 3553(e), or U.S.S.G.5K1.1 to be submitted directly to the judge and not be filed.

Taken together, these amendments reflect the CACM Guidance precisely.

Any additional changes that go beyond the CACM Guidance to implement CACM's general approach and goals are covered in the "CACM plus" rules, Appendix B, pp. 209-16. Judge Molloy noted that the CACM plus rules add provisions that would implement CACM's

goal of making sure there were no gaps revealing cooperation. Judge Kaplan stressed that the CACM plus rules are important. They demonstrate the efforts of the Committee and the Subcommittee to give the fullest consideration to CACM's goal of protecting cooperators and the means that might accomplish it. We all share the same goal here, which is to do whatever we reasonably can to protect cooperators.

Rule 11(c)(2)(B) CACM plus, p. 209. In addition to saying that there must be a bench conference, this states explicitly that any reference to cooperation must take place at the conference and not in open court. The CACM Guidance is not explicit, and to be clear that extra language might be helpful.

Rule 11(c)(2)(D) CACM plus, p. 210. Subcommittee members had observed that written memoranda regarding plea agreements are filed in some cases, and they may refer to cooperation. To parallel the requirement that sentencing memoranda have a sealed supplement, this amendment does the same with memoranda regarding the plea agreement, plugging this gap. For example, submissions may be made when there is some disagreement about a term in the agreement, or a concern the plea agreement might be rejected. This amendment also addresses victim submissions, which are not covered by the CACM Guidance; they would also have to include a sealed supplement containing any information regarding cooperation.

Rule 11(g) CACM plus, p. 211. Since the practice in some districts might be to file a recording of the plea proceedings rather than a transcript, this adds a provision to seal those recordings.

Rule 32(g) CACM plus, p. 212. Nothing in Rule 32 now requires the PSR to be filed, and according to the outstanding study prepared by the Rules office, many (perhaps most) districts do not file PSRs. Because it was clear that the CACM Guidance assumed the PSR would be filed under seal, we added a provision giving two alternatives: filing the PSR under seal, or not filing it. Either would protect the information about cooperation, but to fulfill the CACM approach it would be beneficial to have one amendment or the other.

Rule 32(i) CACM plus, p. 213. The amendment supplements the requirement of a bench conference at which cooperation may be discussed, adding an explicit bar on references to cooperation in open court, similar to the bar added under Rule 11.

Rule 32(l) CACM plus, p. 214. This provision would limit what the parties and victim could do with written information mentioning cooperation, applying CACM's approach of requiring both a public part and a sealed supplement, so that all cases would look alike. Additionally, if the judge gives notice under Rule 32(h) about an intended departure, those notices if filed must include a public part and a sealed supplement.

Rule 35(b)(3) CACM plus, p. 215. The proposed amendment extends the requirement of permanent sealing to orders and any related documents, in addition to the motions themselves that are covered by the CACM Guidance.

Rule 47, CACM plus, p. 216. Like Rule 35 motions, the amendment requires motions for sentence reductions made under 18 U.S.C. § 3353(e) and Sentencing Guideline 5K1.1 to be filed under seal.

The reporters explained that taken together, the CACM plus amendments try to fill what the Subcommittee identified as the gaps in CACM 's recommendations. Gaps are also relevant when considering the potential efficacy of the CACM Guidance rules we are considering to safeguard cooperator information. If there are significant gaps in the CACM Guidance, the rules implementing the CACM Guidance will probably be less effective. CACM's recommendation for sealing Rule 35 motions is a good example. It did not address similar motions for sentencing reductions under 18 U.S.C § 3553 and U.S.S.G. 5K1.1. The CACM plus rules seek to fill the remaining gaps, though it is not possible to prevent all disclosures of cooperation. For example, a cooperating defendant may have to testify in open court. You can never do everything, but this tries to buttress the protection. In doing so, it creates more secrecy, moving more information out of the public domain in order to achieve the objectives of the CACM recommendations.

Members discussed whether Rule 32(l)(1) would be in tension with the Victims' Rights Act. Does the victim have right to know about cooperation? Would the amendment affect victims' substantive rights? The Act does not address documents or filings. Professor King read the Act aloud, noting that it provides the right to be informed in a timely manner of any plea bargain. Members questioned whether the victim has a right to be informed of all of the terms of the plea bargain, which may include cooperation.

Judge Molloy then asked each member to give his or her view of the amendments drafted by the Subcommittee.

A judicial member expressed a variety of concerns about the CACM rules. The problem with the required bench conferences is that anyone in the courtroom can see that there is a long conversation going on for some defendants and not for others. None of the amendments addresses the situation where a person pleads guilty earlier than everyone else, and that defendant's absence at subsequent proceeding may be seen as an indication of cooperation. This member also raised concerns about transparency and the public's right to know what is happening. It is not clear whether any of the sealing procedures apply once a cooperating witness testifies. In the member's district, sentencing memoranda are not filed in many cooperation cases. They are given to probation, the judge, and the other side; they are kept in the judge's file, but are not public records. The court may also seal the record at sentencing, but there is the potential for everything to come out at some point. No option seems to balance this perfectly. If the Committee makes no recommendation, there will be variation in how sealing and in court procedures will be handled. In addition, the dangers for people in prison arise not only from their other codefendants but also from people who think cooperators should be penalized or ostracized.

Another judicial member premised his remarks by saying everyone takes this problem very seriously. There seem to be some concrete things the BOP can do to address this problem. But the only solution that can come from the courts is secrecy, which is not something the courts

can offer. Constitutionally, it is just not the way we do business, but it would really be the only contribution we could offer. Accordingly, the member favored recommending that the CACM amendments not be adopted. This is not a problem that we can fix by amending the Criminal Rules.

Mr. Wroblewski emphasized that the Department of Justice is very much concerned about the dangers to cooperators. The FJC report was a huge contribution to the discussion. The Department is not, however, certain that rules amendments are the best approach. It is very hopeful that the TF and especially the BOP and CM/ECF working groups can offer solutions that will make a dramatic contribution and significantly reduce the problem. The Department is not seeking increased secrecy, because secrecy is already present. The parties routinely do not file documents concerning cooperation. For example, another member noted that defense lawyers often redact sentencing memoranda, do not file them, or seal them. But the current efforts to use secrecy to protect cooperators are very haphazard, and can be circumvented by people interested in doing harm. The Department hopes that the CM/ECF architecture can be revised to bring the current redactions and secrecy into a form that will eliminate or greatly reduce the ability to circumvent the current rules and do harm to cooperators. The Department hopes the BOP and CM/ECF working groups can address these problems in a non-rules way and make a significant contribution. The BOP has been involved with that working group for many months and has been as cooperative as it possibly can be. He expected the TF recommendations will be very helpful and will be largely adopted by the BOP over time. There are some issues with union rules and the BOP's ability to adopt recommendations, but once the TF comes out with its recommendations that process will begin and we are hopeful that we can actually implement most of those. For those reasons, the Department abstained from the votes on all of these rules at the subcommittee level. We hope that these problems will be addressed in other ways that will be successful.

After complimenting the reporters on their work, another member said that in order to fully implement the CACM Guidance and goals it would be necessary to adopt something like the CACM plus rules. These procedures would be draconian, creating second sets of books and secret proceedings. He strongly opposed that approach. He objected to calling the current approach haphazard. The Supreme Court requires a case-by-case approach to sealing records. The current system relies on judges in individual cases to weigh the need for secrecy and sealing against the public's right to know. He endorsed that approach. We need judges to do what is right in an individual case, rather than a legislative type solution. The CACM rules attempt to change substantive rights. The member added that it would be better to revise the union rules within the BOP than to amend the Rules of Criminal Procedure. The concern about misuse of the PSRs should focus on access in the prisons and what the BOP and the marshals can do to protect cooperators. The member appreciated the candor of the FJC report, which stated that it is impossible to identify the empirical effect of any policy individually, or in combination with other policies, on the amount of reported harm to cooperators. The CACM proposals are not data-driven. They propose secrecy in the courts based on fear not data. At an earlier meeting, another member said that even one death of a cooperator is too many, but that is not a reason to

sacrifice the core values of the system. We should not alter the requirement that individual judges must make the decision to seal in individual cases, and we should not seek to change the constitutionally based procedures required by the Supreme Court. This is a serious problem. There are things that can and should be done, and they are primarily the responsibility of the executive branch. The member was pleased to hear from Mr. Wroblewski that the executive branch is undertaking that. The member expressed concern that TF does not have representation from the defense bar, and wondered why that was so. He hoped the TF would take proper action, and once those changes had been implemented we can see how successful they have been in accomplishing the goals.

Judge St. Eve, the Standing Committee liaison, expressed the view that the proposed rules closely adhere to the CACM recommendations, and complimented the reporters for their work. After spending a lot of time with the TF and talking to people at the BOP, she believed cooperators are being targeted to some extent because of their cooperation status, especially in the high security facilities. She did not, however, support the proposed CACM rules because they go too far. With regard to Rule 11, she noted that the Seventh Circuit disfavors any kind of sealing, and was unlikely to accept the bench conference procedure and limitations on what is available on the docket. She drew a distinction between changing procedures in the courtroom and making changes in the docket. She stated that the PSR approach was unworkable, and strongly opposed by Probation Officers, who did not want to be custodians of these significant documents. Keeping documents in the PSR rather than the court record could cause all sorts of issues later in certain cases.

Another judicial member echoed the praise of others for the work of the reporters, and Judge Kaplan for his leadership on the Subcommittee's work. The rules drafted by the Subcommittee do track what CACM called for, which would be a dramatic sea change in the Rules of Criminal Procedure. Agreeing with other speakers, the member said that the CACM rules raise tremendous transparency problems. The member was glad to hear that the CM/ECF working group had focused on some of the issues concerning remote access. For this member, the desirability of moving forward with the remote access approach was an open question, in large measure because of the uncertainty about its effectiveness and the absence of empirical information. At most, it seems likely the changes would improve things at the margins. It is not possible to eliminate danger to cooperators, who can be identified in many other ways (such as the disclosures required by *Brady* and by *Giglio* when someone testifies). In addition, there is no way to control disinformation, such as the belief that anyone who has made bail must be cooperating. These proposed rules show us what the CACM Guidance would require, and it is not something that we should support as a Committee. The member was opposed to adopting any of these proposed CACM rules.

The next member to speak, a practitioner, echoed the thanks to all the people who worked on the very helpful materials. This is a real issue and the system has a moral duty to try to protect cooperators, broadly speaking, without abridging anyone's rights. Being a cooperator is a very vulnerable position. Just as prison officials owe duties to someone in a captive setting, this is sort of that squared. Without cooperators it would be very difficult to successfully prosecute

many senior people who engage in sociopathic conduct. That's why prisoners are working so assiduously to try to stop cooperators. This is a very difficult problem because we are working at the margins, and the main risk factors seem very difficult to address through this sort of system. Although he agreed that one death is too many in this setting, the proposed approach doesn't seem to move the ball forward. He hoped other avenues would lead to some concrete proposals. Individual judges are not reluctant to deal with this issue, but giving hundreds of district judges only general instructions to "do your best" without some structure and some uniformity won't work. He hoped that some tools could be made available at least presumptively to produce a more coherent landscape, rather than leaving everything up to the discretion of each individual district judge. The member said the bottom line is that the CACM approach does not move the ball forward enough and has multiple problems. At a minimum, we should table it and see what the future holds in other areas to make things better.

The Committee's clerk of court liaison said he was focused on how the proposed rules would be implemented. He agreed that it would be a sea change in how the courts do business, going from the default of transparency to a default of concealment. The culture of the courts, the training for the clerks' offices, and the system we use for our records are not designed for that new default. They are designed for transparency. Denying rather than granting access involves work. There are many steps to sealing a document. Once a judge says seal a document, somebody has to identify the document, place it under seal, define an access user group, and maintain that user group. When you are dealing with sealing as an exception this is not a big problem. But if we require every one of these various things to be sealed, that will create an opportunity for many mistakes. It would also be a change of mindset. When electronic filing was implemented, there was a huge amount of training. The CACM rules would require at least parallel training. It is important to keep in mind that the universe of users on EMECF is much broader than just attorneys. The overwhelming majority of those doing the filing are paralegals and staff. The responsibility for sealing would not be borne, generally, by attorneys, but by all of the staff members with whom registered attorney users have shared their logins IDs and passwords. The clerks have no way to identify those people because the login and password remain the same.

The clerk of court liaison also commented on the need to distinguish between access on PACER, and a court's CM/ECF system. The parties could think that references to remote electronic access refer to CM/ECF access rather than the broader access in PACER. If a defendant complains he does not have access, clerks do not want to have to explain to him the difference between CM/ECF and PACER access. Down the road as we move toward more universal electronic filing, this problem will increase because more people who are not attorneys will have accounts.

From the implementer's perspective, this is an architectural issue. The current CM/ECF system is not designed to do what everybody is trying to facilitate, and trying to adapt it through human intervention is a recipe for disaster. He dreaded the idea that somebody else would have control of his court's records. He had always believed he was the custodian of the court's records. The no filing idea of farming records out to probation or not filing things is frightening.

He had always thought that if you go to the archives you get a case file. Everything is there, but that would not be the case with some of these suggestions (the PSR and no file options). From an implementer's perspective, it would take a tremendous human effort to implement these procedures.

A judicial member stated that the Subcommittee's draft rules properly and faithfully implement the CACM Guidance. He urged that to the extent we can, we should amend the rules to make it more difficult for bad people to identify cooperators and harm them. The fact that any rules-based approach won't solve the problem entirely should not be a reason to take no action. If we can save 15 of the 30 cooperators who might be killed, those 15 will be very happy. If we are unable to solve the problem completely, we should at least work to solve it incrementally. There are First Amendment and transparency concerns that we need to take very seriously. It may be that the CACM Guidance would cut into the muscle and the bone of the First Amendment, and is not something that we want to do. There must be some measure that we can take, perhaps less drastic than what CACM has proposed, that will move the ship in the right direction. The First Amendment it not a suicide pact, and it is also not a homicide facilitation pact. The First Amendment should not get in the way of modest common-sense improvements to help protect the cooperators that are so essential to the operation of the criminal justice system. We should see what the TF and the BOP come up with. They should be the first movers, and then we should take stock and evaluate whether we can add anything through rules amendments.

A judicial member commented that it might make a great deal of sense to see what the TF and the BOP come up with before imposing rules amendments. The member's state courts are just bringing electronic filing on line, so they have no experience with these issues. They would benefit from the Committee's discussions. For the matters on the table now, the proposal to defer action and then make modest rather than dramatic changes makes a great deal of sense.

Another member endorsed the idea of careful and modest changes rather than dramatic ones given the difficulty of knowing what might work, the First Amendment issues, and the great difficulties and cost of implementing any proposal. The best approach is treading carefully and looking for modest solutions, rather than overarching ones.

The next judicial member began by thanking the reporters, stating that the memoranda are extraordinarily helpful and he was persuaded that the Committee should not recommend the CACM rules changes. The member presides over many change of plea proceedings. Doing a private bench conference in each would be difficult, and the plusses would not outweigh the minuses in that situation. By local rule the member's district does include a sealed supplement to every plea agreement. He noted that there was a question whether that would withstand a constitutional challenge, noting it has never been challenged in the district. In the district's experience, it has been successful and practical, but he could not say whether there is (or ever could be) any data-driven proof that it actually prevented anyone from being hurt or having their cooperation revealed. The member agreed with prior comments that there are serious problems in the prisons that should be addressed, but that is only part of the problem in the member's

district, Puerto Rico. In the past 10 years, people were murdered on two occasions on the same corner near the courthouse. Both were defendants who were out on bail, had just met with a probation officer, and then walked out of the courthouse. The member did not know, but presumed they were cooperating, and the bad guys were there waiting for them. There are also threats to families of people who are presumed to be cooperators, and lots of bad stuff goes on in prison. So, at least in Puerto Rico, attacks occur on in the street as well. This certainly affects cooperators, but it also has a negative effect on the criminal justice system and other defendants as a whole. People who would cooperate and might get a lower sentence do not do so because they are afraid of what is going to happen to them and their families if they cooperate. In Puerto Rico, the problem extends beyond cooperation to the safety valve. Many people in the district decline to use safety valve, which quite often is not onerous. You sit down with an agent and you say what it is you may or may not know, and you may get two points off your sentence. Yet many defendants decline to do so because they see that as cooperating. Judges would like to use the safety valve to go below the mandatory minimums, but these individuals are afraid to use the safety valve and will not do so.

A practitioner member stated that the CACM proposal is seriously problematic for all the reasons that had been discussed. The member highlighted just a few problems. One is the required bench conference where the parties would inform the court whether there had been cooperation or not. The materials noted that it might be necessary to extend the bench conference when there has been no cooperation so that would not be obvious to observers. The member expressed concern that this would go beyond being secretive to the court being deceitful, which is very problematic. Second, it would be awkward to require defense counsel at sentencing to tell the judge that the defendant did *not* cooperate. A defense attorney would not normally tell the court what the defendant had not done that might be beneficial to the community, because it would cast the defendant in a negative light. Counsel should not be thrust into that role. Many of the problems do arise in the prisons, and the BOP can and should address them. The member's district includes a large prison complex, including one entire prison that is devoted to cooperators. That does not prevent prisoners from killing each other there. The other problem the BOP has to deal with is that prisoners in protective custody do not have access to the full range of programming, which is problematic for people serving long sentences. The reporters' memos were terrific, and the draft rules are faithful to what CACM wanted. The member was not in favor of the CACM proposal, but noted if it were adopted it should be CACM plus, which addresses some problems CACM didn't identify.

Judge Kaplan noted that his responsibility as TF chair is to attempt, if possible, to reach an appropriate and mutually acceptable ground between CACM and the Committee. For that reason, he had abstained in the Subcommittee and said he would do so again at this stage.

Judge Campbell said he found the members' comments, the work of the reporters, and the work of the subcommittee very valuable. He agreed that the draft rules are faithful to CACM's proposal, and they do a great job of illustrating what would have to happen in the Rules of Criminal Procedure if the CACM Guidance were implemented. CACM plus is particularly

helpful in showing that if you really want to accomplish what CACM says, there has to be a very extensive change in the way in which the rules are currently structured.

Responding to the question how it would be appropriate for the Committee to proceed, Judge Campbell said it would be entirely appropriate for the Committee to say to Standing, "We've done what you asked, and we fleshed out different rules drafts that would accomplish CACM. Here they are. We don't recommend that any of them be adopted." It will be very helpful to have all of those drafts in hand to understand what it would really require to carry out CACM's recommendations. Judge Campbell said that he did not disagree with the comments identifying problems with the procedures recommended by CACM. When they were considered in his district, a committee of district judges, magistrate judges, defense attorneys and prosecutors concluded that it was not possible to make the courtroom part of CACM's recommendations work, for all of the reasons that have already been discussed. His district routinely seals cooperation related documents, which could raise a First Amendment issue. They put all cooperation-related documents in one place in the docket, and when looking at the docket you cannot distinguish between cooperators and non-cooperators. But his district concluded that the full CACM package would not work.

Judge Campbell thought it was well worth considering Rule 49.2 and trying to help in some degree by limiting remote access. If the CM/ECF working group comes up with a means of configuring the dockets so that cooperators would not be identifiable, he suggested it might make sense to have the Rules Committee attempt to draft a rule amendment to implement that system. The Rules approach would have several advantages. First, this Committee would be terrific body from which to get input. He was not sure the CM/ECF working group has the same broad representation. Second, a rule amendment would have the great benefit of publication, public comment, and review by the Standing Committee, the Judicial Conference, the Supreme Court, and finally Congress. So you get much broader input. He was not sure if there would be a jurisdictional issue. CACM may take the view that that CM/ECF is their territory, and they ought to be the ones to make any tweaks to make the dockets uniform. This would have to be discussed with the CACM chair. But it was an open question in his mind about whether this Committee should consider and at least give input on any proposed solution to change the docket to eliminate clues to cooperation. In his district, they accomplish this with a master sealed event included on every docket sheet. Anything related to cooperation is filed there in the docket, and sealed as it would be in its own place. But someone looking at the docket sheets can't identify cooperators. All of the docket sheets look the same. CM/ECF is considering something similar and whether there is a more automated way to do it. Judge Campbell expressed some concern about leaving that decision entirely to the CM/ECF working group and losing the input of this Committee and as well as public comment.

Judges Kaplan and St. Eve discussed the interplay between the TF working groups and the proposed rules changes. Judge St. Eve said the CM/ECF working group was looking at possible changes in the CM/ECF system, and its ultimate recommendation would go to the TF. Because this is a TF working group (not a CACM committee), it could come back to this Committee. Judge Kaplan commented that it was fair to say that the Rules Subcommittee has

simply put the Rule 49.2 draft on hold pending developments in the TF. It is wide open for the issue to come back here.

Judge St. Eve was asked to comment on activity at the BOP. She said that it has not yet done anything. Everyone at the BOP has been completely cooperative with working group members over a period of several months, and the TF working group has come up with a lengthy list of recommendations for the BOP. This includes making all cooperation documents contraband at BOP facilities; at present only PSRs are contraband. At its meeting this summer, the TF discussed and approved about a dozen recommendations to the BOP. The BOP has not yet taken any action. It is waiting for the TF's final recommendation before starting to implement any of the recommendations. The BOP supports our recommendations, but many of them require action by the BOP union. They think it is better to come to the union with a complete slate of recommendations, rather than taking them up on a piecemeal basis, and they are more likely to get union approval if they come with the blessing of the TF and the Judicial Conference. Then they could say these recommendations have been blessed, we are seeking to implement them, and now we need the union to sign on. Nothing has happened yet, but the BOP is aware of and supports the recommendations. This will go back to the TF meeting again in January. Judge St. Eve was not sure whether the TF would take any final action at that point.

Judge Kaplan briefly reviewed the highlights of the TF recommendations concerning the BOP:

1. Limit transmission to BOP inmates of certain case documents including plea agreements, sentencing memoranda, docket sheets, 5K motions, and transcripts.
2. Preclude possession of court documents in BOP facilities outside of an area designated by the warden.
3. Encourage the BOP to punish inmates who are pressuring other inmates for their papers.
4. Require that probation officers transmit case documents to BOP inmates consistent with the above guidance. [That really means sending to the warden who would make them available in a secure location.]
5. Require that court reporters transmit transcripts to inmates in the same way
6. Consider use of various electronic means of limiting access from within the institutions.
7. Impose limits on pretrial detainees' continued possession of case documents once they are designated.
8. Collect data on harm to cooperators.

. . . there are recommendations with regard to designations . . .

11. Modify and enter contracts with private prisons consistent with BOP procedure.

Judge Molloy expressed concern that there was no empirical basis for making the connection between cooperation and harm. The FJC survey is not the equivalent of empirical data. When he and Judge St. Eve visited with the BOP, they consistently pointed out that

cooperation is of two kinds: cooperation before you are sent to prison and cooperation while you are in prison. The latter is unconnected to anything that would be filed in a court or show up on the docket sheet.

Judge Campbell responded to the comments about the lack of empirical data. He agreed that we do not have case-specific data that on whether certain individuals were attacked or threatened because they were cooperators. The problem of lack of empirical data affects all of the rules committees. When changes are proposed, there is seldom empirical data to support them, and generally we cannot get it. Collecting truly reliable empirical data in the judicial system is a very difficult undertaking, and the Federal Judicial Center has limited resources for this purpose. In his view, the Rules Enabling Act was designed to operate on the collective wisdom of people like the committee members who are on the ground working with these kinds of issues, plus the public comment process—not on the basis of hard empirical data. He also noted that the anecdotal information from the FJC survey and the information from BOP, taken together, provide a pretty strong indication that there is a link between judicial procedures and threats to cooperators. We are not likely to have a stronger link. There are other good reasons to say the CACM Guidance is problematic, but he resisted the idea of basing a decision not to move forward on the absence of empirical data.

Judge Molloy responded that on the day an assault occurs the BOP has a great deal of information about the institution and about the level or degree of the assault, but nothing that would tie the fact that the person is a cooperator with the assault. We also know that if an inmate is in a penitentiary or a high security facility there is a much greater likelihood of injury or death than if they are in a camp or moderate to low level prison. Perhaps part of the solution might be for BOP, as a matter of practice, to investigate whether persons who have been assaulted in prison had cooperator before, or after, they reached the prison.

A judicial member asked for clarification of the word "table." Did the suggestion of tabling envision a distinction between a motion to oppose adoption of the CACM rules at this time and a motion to table?

The member who suggested tabling said he did see a distinction. If the motion opposing adoption meant the CACM rules are dead and buried, there is a distinction. And if opposed means not now, but maybe we'll come back to it, he would prefer to table. The substance of what he would support is to put this aside and then come back to it after the BOP Working Group tells us what it is going to do.

A member commented that he would like to oppose the CACM recommendations and table the Rule 49.2 issue.

Judge Molloy stated that the issue is whether the Committee was going to adopt the recommendation of the Subcommittee to tell the Standing Committee here is the package of the rules implementing the CACM Guidance and we think none of them should be adopted.

Judge Kaplan suggested that we should first have a motion to adopt the Subcommittee's recommendation, and then if someone moved to table that would be voted on. He noted his opposition to tabling, because we already know what the BOP is going to do.

A judicial member said that consistent with the spirit of the Committee's discussions it should reject the CACM rules, making it clear that this Committee does not (as we understand them now) remain open to adopting them after the BOP or the TF does something later. To the contrary, we think these particular proposals are a bad idea, but we remain open to other means that we could explore after action by the TF or other bodies.

A judicial member moved to oppose adoption of the CACM rules, and to defer final action on any alternative approach that would limit remote electronic access in order to reduce the likelihood that judicial records would be misused to identify and harm cooperators. The motion was seconded.

Another judicial member agreed with the proposal to put aside Rule 49.2, but suggested deferring action on the CACM proposals. He agreed that he could not imagine a situation in which the Committee would accept all aspects of CACM's recommendations. But after BOP makes its final determination there may be certain aspects of the CACM proposal that we might think are good incremental measures. So he moved to put aside any up or down vote on the CACM rules, which could be revisited in light of the BOP's final actions on the TF's recommendations.

Judge Kaplan said that if there was a second to the motion to table, it should be voted on.

A member asked if there was any appetite in the group to consider the CACM rules one by one, noting that he had more problems with some than others. When asked if he could identify some that were beneficial, he responded yes, though he was not certain that they would be constitutional.

There was a suggestion of a friendly amendment, that we reject the CACM rules but defer action on the remote access or any other potential rule amendment, for example rules implementing changes in CM/ECF, rather than limiting ourselves to the just the remote public access.

After the motion to table was seconded, members asked for clarification. Was it expressing agnosticism about the CACM rules?

A member supporting the motion responded that it was not agnosticism in the sense of no view about anything about any of the CACM proposals. It was, instead, a more modest step than saying we are not prepared to adopt any of this. If nothing comes to bear fruit in the future, there may be pieces of this that merit further consideration as a possible alternative, perhaps tweaked. The motion to table would not signal that the entire project should be thrown into the trash heap unless there is something completely different. He supported that approach, which is more modest and flexible than complete rejection. He honestly did not know how many other

alternatives people can come up with that are unrelated to CACM's proposals. There is only so much space in which to operate.

Judge Kaplan expressed his opposition to the motion to table. The Subcommittee has considered each and every part of the CACM recommendation, including each and every thing that we could imagine ought to have been included in it, but wasn't. The Subcommittee then concluded, without dissent, that it was not prepared to recommend adoption of the package or any of the variations. Action by the Rules Committee with respect to that proposal is a very important input for the TF, which has been waiting for this recommendation, one way or the other, for a very long time. This is not a criticism, but the process has taken time. To table it now lays the ground work for an argument that the TF should wait with respect to various alternatives, to see whether there are rules solutions. We have spent well over a year looking for rules solutions. The Subcommittee's view is that there is no rules solution to be found on the landscape that we are now familiar with. Of course, given time it is possible someone may have a brand new idea, or CACM could return and say given where we are now, let's do these one or two things. We are always open to consider that again. He advocated trying to play the hand of cards we've been dealt.

A judicial member observed that some members seemed to be worried about a preclusive effect. It is hard for a new member to understand how much of a preclusive effect our voting this package down would have on something in the future. What if the BOP comes up with something, implements it, and there are still many cooperators dying?

Judge Molloy responded that if there are suggestions for rules changes the Committee has an obligation to consider them. If this Committee adopted the Subcommittee recommendation to reject the entire package it has worked on for over a year, someone can come along later (either a member of CACM or some other individual or interest group) and suggest a similar change, perhaps to Rule 11. He thought there would be no preclusive effect other than the matters that our Subcommittee has considered.

Judge Campbell agreed. Other committees have decided not to act or rejected a proposal, and then revisited it a couple of years later. However, in his experience most committees do not come back too quickly after they have put a lot of effort into something. Perhaps in light of this vote we should not reopen the same issues at the next meeting, but there is no bar on a member of this Committee asking to reopen and revisit at the next meeting.

Professor Coquillette agreed that there is no preclusive effect. Anybody on the Committee can raise this again. Professor King observed that this Committee has considered the same rule multiple times. It can come back in the various ways that have already been discussed. That said, Professor Beale expressed the hope that the Committee would not repeat the discussion of the very same thing at the very next meeting.

Mr. Wroblewski noted that DOJ is not waiting for the BOP to act; the BOP is part of the DOJ. DOJ is waiting for the CM/ECF proposals, which it thinks have a chance of addressing many of the relevant concerns in a non-rules way. DOJ would abstain. It wants to see what

CM/ECF and the BOP recommendations come out of the TF, and we believe those are significant steps for addressing a genuine problem.

Judge Kaplan observed that there was a broad consensus at the TF about the BOP recommendations, and he asked Mr. Wroblewski for his sense of how these recommendations are going to come out. Mr. Wroblewski responded that he was focused on a second element, changing the architecture of the CM/ECF, perhaps along the lines of what is going on in Arizona. DOJ thinks that the BOP and the EMECF approaches, in combination, could be the solution for now, for the foreseeable future. It would reserve the right to come back, if the CM/ECF does not make any changes, or if we think those are not sufficient.

The motion to table any final recommendation on the CACM rules failed on a voice vote.

The Committee then turned back to the motion to oppose the CACM rules as well as the variations drafted by the Subcommittee, and to defer final action on the alternative approach of limiting remote access. A member moved to sever the two portions of the motion, and the motion to sever was seconded and passed by a voice vote.

The motion to adopt the Subcommittee's recommendation to oppose the CACM rules proposals in all forms passed with two no votes. Judge Kaplan and Mr. Wroblewski abstained.

The motion to hold in abeyance any final recommendation regarding Rule 49.2 passed unanimously.

B. Discussion of draft Rule 49.2

At Judge Molloy's request, Professor King explained the Rule 49.2 proposal. The most recent version is on p. 157 of the agenda book. This approach avoids the First Amendment problems that arise from limiting all access to plea and sentencing documents, allowing the same access that was available before the internet. Before online access, anyone who wanted to see a document had to go to the courthouse. The proposed rule was modeled on Civil Rule 5.2, which limits remote access in order to protect confidential information such as social security numbers. The proposal is premised on the idea that if it is acceptable to limit remote access in the Civil Rule, it should be equally acceptable under the First Amendment to limit remote access to protect cooperators in criminal cases. The first part of the rule designates who has access to an electronic file. Subsection (b) provides for access by the parties and their attorneys, and subsection (d) access by the public. The Subcommittee reviewed the options for defining and distinguishing the press from the public and decided not to draft special provisions for press access.

In general, parties and their attorneys can have remote electronic access to anything that is not under seal or otherwise restricted in a way that bars access by the person seeking access. We added a reference to other restrictions because we were informed by our clerk liaison and others that sealing is not the only way that electronic access is restricted under the CM/ECF system. For example, if something is filed ex parte, the party that files it has access, but the other parties do not. Whenever a party files a document, the party has the option of restricting

access to certain individuals or groups. We wanted to make sure that the rule reflected not only sealing, but also any other restriction placed on access. Attorneys can have access to any of it as well, under subsection (c). That was a policy choice by the Subcommittee. Under (d) the public can have electronic access only to the indictment, the docket, and an order of the judge. If the public or a non-attorney seeks access to another part of the case file, that person must go to the courthouse and provide the clerk with identification in order to get that access. The Subcommittee has not completed its work on Rule 49.2.

Judge Molloy noted that although the Committee has tabled a decision on 49.2, it would be helpful to get comments to guide the Subcommittee.

A member expressed opposition to the proposal because of it affects the poor and those unable to travel to the courthouse and without surrogates who can travel for them. He compared their plight to his own ready access through Law360, which can be set to provide him with updates on anything filed in selected cases. Since subscribers to such services could have full access, the only people who would be hurt are poor people who lack this access.

Professor Beale noted that if the proposed rule were adopted, it would no longer permit remote access by services such as Law360. The Subcommittee's assumption is that the press and subscription services would not go to the courthouse every day to see what is filed in every case.

Professor King commented that when the Subcommittee discussed giving all attorneys access it recognized that most organizations, media or otherwise, will have legal counsel. So simply by using counsel's login, any organization (whether it is Whosarat, or Fox News, or CNN, or NPR) could use the attorney-access clause to set up any kind of trolling device they can manage. That is something to consider if we get to the point of crafting a policy on who has remote access. If it is limited to attorneys, it is not limiting very much if organizations all have attorneys.

Judge Campbell raised a question about Rule 49.2(d)(2)(i), which allows the general public to have remote access to "the docket maintained by the court." He understood that one of the main reasons for limiting remote access was that prisoners would have family members or gang members on the outside go on PACER and look at dockets to determine whether individuals were cooperators. Even if documents revealing cooperation were sealed, the sealing itself served as a red flag indicating cooperation. So how well would 49.2 protect cooperators if (d)(2)(i) allows remote access to the docket?

Professor King responded that the Subcommittee was concerned about a decision of the Eleventh Circuit holding that it was unconstitutional to have part of the docket that is not public. The subcommittee also assumed (at least some members did) that the TF working group on CM/ECF would be handling docket-creation issues, so that whatever docket was produced after the TF was done would be the docket the public could access.

Judge Campbell reiterated that his concern was whether (d)(2) undercut the purpose served by limiting remote access and requiring members of the public who might be seeking information about cooperation to visit to the courthouse under (d)(1).

Professor Beale responded that the Subcommittee used Civil Rule 5.2 as a model, and it allows electronic access to the docket, although other materials are private. However, it is not perfectly analogous because of the red flag problem in the criminal context. Probably that should have been in brackets too because we were already waiting on the CM/ECF working group. Is there some solution that could come from that? If not, then this would mean that some things available online would have the red flag problem.

Professor King commented that in addition to basing (d)(2)(i) on Civil Rule 5.2, there was at least some discussion of what the public expects it should be able to see. The docket sheet is critical because it shows what going on in the case: how far along is it, whether there has there been a decision, etc. Access to the docket is not only an important part of Rule 5.2, it is also an important part of transparency.

Judge Campbell expressed concern that if the TF does not devise a system that cloaks cooperation material on the docket, then it would serve little purpose to adopt Rule 49.2 if it included (d)(2)(i). If we are not accomplishing the goal or protecting people by limiting the ability to scan the dockets on PACER, why limit remote access at all? If we are going to accomplish that, we ought to drop (d)(2), and say go to the courthouse. On the other hand, if the CM/ECF working group comes up with a uniform docket that does not give those clues, we may not need to limit remote access. People going on PACER would not be able to tell by scanning the docket who is cooperating. So, either changes to CM/ECF will solve the problem, or limiting remote access could do so, but only if we delete (d)(2).

In response to the question whether he thought it would be necessary to drop all of (d)(2), or just (d)(2)(i), Judge Campbell said it would be necessary to consult clerks and others. But certainly at least access to the docket.

The Committee's clerk of court liaison explained that there are subscription services that data mine CM/ECF and report out almost instantly when documents are filed. He predicted these services would strongly oppose Rule 49.2 because it would totally undermine their business model. They no longer come to the courthouse because they have the electronic access. He agreed that under (d)(2), the filings are enumerated so you would know if anything is missing, and you are seeing everything that goes on. Moreover, he thought it may cause confusion to talk about PACER in (b) and about the court's electronic filing system in (c). He could imagine a member of the public coming in under (b) and demanding a login in and password to get electronic access. They would not understand that only PACER access is contemplated under (b), and be confused. It might be necessary to add something in the Note or otherwise to refer to (b) as PACER access in contrast to (c), which provides for registered users of the court's electronic filing system.

A member observed that under the Rules Enabling Act, 28 U.S.C. § 2072, a rule cannot abridge substantive rights, which could include economic rights of business organized to assimilate court filings for the public and the bar. Another member responded that he doubted that there is a substantive right to any business model a service adopts out of self interest.

A member drew attention again to lines 7, 8, and 9, saying they were at the heart of the issue: who should get largely unrestricted access to court filings in criminal cases? That issue is before both this Committee and the CM/ECF working group. How narrowly or broadly should access be defined? Because if you make it very wide, that greatly reduces the benefit of limiting remote access. But if you make it too narrow, you have other serious problems.

Another member agreed that for purposes of the Rules Enabling Act that there is no right to any particular business model. He asked if he was correct in understanding that some districts are now restricting online access and making people come to court and present identification. Professor King said two districts have this procedure in place now. The member then observed that limiting remote access seems a practical step, noting it was hard to believe that the Constitution that allowed this system in the 1990s prohibits it now. The issue is finding the balance between letting people have access without making it too readily available. It is essential to keep in mind that there are attacks on people who are cooperating. We need to find a balance.

Another member observed that this seems like the kind of problem where individual districts are trying different approaches, and the Committee should draw on their experience, determining what works and what does not work before considering a one-size-fits-all answer under the Rules. It seems to be a classic empirical question as to what actually stops people, and what is too much of a burden to stop this harmful conduct.

The reporters explained that three districts now restrict remote access. The Eastern District of North Carolina has a policy about sealing and restricting remote access to plea and sentencing documents. If you come to the courthouse, you can have access to those. Additionally, criminal defense lawyers can certify they need remote access for representation in a criminal case. Two districts in Texas also limit remote access, but the reporters thought this was not limited exclusively to plea and sentencing agreements. One option would be to designate a category of documents that have restricted access and lift that particular restriction for in-person activity. In contrast, Rule 49.2 does not break up categories, but says this is what you get online and everything else you have to come for in person.

Judge Campbell related the approach in the District of Arizona. Every criminal docket has as the third or fourth docket entry a master sealed event. All criminal dockets look the same in this respect. Cooperation addenda to plea agreements, 5K1.1 motions, sentencing memoranda that discuss cooperation, and anything related to cooperation goes into the master sealed event. The dockets in every case look the same because they all have a master sealed event. That practice was adopted to eliminate the red flags from the docket itself. The master sealed event is sealed under CM/ECF like any sealed document. The Arizona district courts have not focused on the First Amendment issue yet. If there is a First Amendment problem, the docket could still be structured the same way but with judges making individual decisions on whether it should be sealed and, if so, what would go in there. If CM/ECF were to come up with something like that, there would be no need to limit remote access, because there would be no clues on the docket and no public access to sealed documents.

Professor Coquillette commented that the FJC could assist in analyzing the experience in the courts that have restricted remote access. He likened this to the pilot projects on initial disclosure and accelerated dockets.

Professor Beale provided some additional information on the districts that limit remote access and require you to come into the courthouse. In addition to the Eastern District of North Carolina (already discussed), as noted on p. 248 of the agenda book, the Western District of Texas, El Paso Division, implemented this system recently. The reporters spoke to representatives of that court by telephone, and they said it is working well, but they have very few people who want to come in and see anything. And the Northern District of Texas responded to a TF survey saying it limited remote access. So those three districts we identified as using practical obscurity. There are several relevant questions. One question is whether you have to show identification if you come to the courthouse to view case files. Another is whether it would be possible to track what individuals viewed at the courthouse. Judge St. Eve said it would be so useful to learn what parts of the file people wanted to see. If you do have to show ID to see a file and later it is possible to track what files you viewed, it might be possible for the government to connect the dots if someone whose file you had viewed was subsequently attacked. This also depends on what else is available remotely to anybody online, as Judge Campbell had noted. So, all of those are in play in trying to design something under Rule 49.2.

The Committee's clerk liaison expressed a concern about the language of Rule 49(b)(2) which states parties and their attorneys "may have remote electronic access." Professor King said she understood his concern to be that this language (which is now present in Civil Rule 5.2), might carry with it the connotation that not only must the court not block electronic access, but that the court must take affirmative steps to provide electronic access. Although this argument seems not to have arisen under Civil Rule 5.2, it might be possible to revise the language to make this clearer. Clarifying language might, however, generate opposition at the Standing Committee, because it would diverge from Civil Rule 5.2 and might even suggest a negative inference about Rule 5.2. However, if this is a potential problem, the Civil Rule could be amended as well. In his experience, those who are most interested in having remote access will focus on this and view it as a right to remote access.

Professor Beale reminded the Committee that it had recently had a discussion about what "may" meant in the context of Rule 5 of the 2254 and 2255 Rules, and the style consultants were very clear about what "may" means throughout the rules. So that would be one of the things to watch out for; it is not just Rule 5.2 of the Civil Rules, but throughout the rules "may" has a certain meaning. We should be cognizant of not creating contrary implications. That is definitely something to keep our eye on.

A member raised one more technical point about the relationship between subsections (b) and (c); (b) says a party's attorney can access any part of the case file, and (c) says any attorney who is registered can access any part of the case file. It would seem unnecessary to have the reference to the party's attorney in (b), because by definition they are going to be in the larger group in (c). If you had this content, (b) could be the parties, and (c) could be all attorneys. The

reporters agreed that the overlap could be eliminated if all registered attorneys are given full access.

III. Disclosure of the PSR to the Defendant; Rule 32(e)(2) (17-CR-C)

Judge Molloy noted the issue whether the Probation Officer must give the PSR directly to a defendant had been raised in his district, and he asked the reporters to provide background. The reporters provided information on the development of Rule 32(e)(2) in the agenda book, beginning p. 257. A process of gradual evolution began in 1983. Initially, the PSR was an internal court document that defendants and their counsel were not allowed to see. In 1983, the rule was amended to allow the defendant and counsel to read the document, but they could not have their own copy. The next step was to provide them with a right to receive copies that they had to return. Eventually the Rule provided a right to receive the PSR with no further restrictions.

The Committee deliberately granted individual defendants (as well as counsel) the right to receive the PSR. In 1983, when Rule 32 was amended to permit the defense to read the report, the Committee emphasized that the PSR should go to both the defendant and his counsel, in order increase the likelihood that erroneous information would be noted and corrected. Because defendants often know more about the information that goes into the PSR than counsel, they need to be able to review the PSR themselves to identify any errors.

The Committee also recognized the possibility that a defendant's possession of his PSR may sometimes be dangerous, and this issue is mentioned in the Committee Notes. In 1989 when Rule 32 was revised to give the defense the right to receive copies of the PSR and to eliminate the requirement that these copies be returned, this danger was mentioned in the Committee Note. The Note stated that when retention of the report in a local detention facility might pose a danger, the district court could direct that the defendant not personally retain a copy in that facility. Despite the Committee's recognition of the potential for problems if PSRs made it into the detention facility, the Rule itself required that the PSR be provided to the defendant. Thus, the Rule balanced the danger against the need for defendants to review the draft PSR to get ready to consult with counsel. Another Committee Note recognized that access to PSRs within these institutions would fall beyond the Committee's rulemaking powers.

Judge St. Eve's discussions with the BOP had highlighted the tension between the need for defendants awaiting sentencing to review sentencing documents such as the PSR to insure the accuracy of that process, and the danger that sentencing documents may be misused and cooperators threatened. There may be technological fixes that were not available when the rule was drafted and revised. The BOP is exploring options such as having kiosks where defendants would be able to look at their own information but not print it, show it to others, or post it.

Since 1989, when the defense got access to the PSR, it has been the Committee's view that it is important for both the defendant and his counsel to have a right to that document. The question now is whether now the situation has changed enough because of threats that the Rule should be amended. For example, the Rule could provide that the PSR should go to counsel and

be discussed with the defendant. Should a subcommittee be tasked with an in-depth review of this issue?

A member asked if the reporters had any further insight into why the rule was amended to eliminate the requirement that the defense return the copies of the PSR. The reporters did not. They had reviewed the relevant Committee Notes, but deferred further review of the minutes and other records until after the Committee determined whether it wished to take this matter up.

Discussion turned to the question of the practice under the rule. One judge commented that in his district the practice is to send it only to the attorney. Then under Rule 32(i)(1)(A) the court has to confirm at sentencing that the defendant and counsel conferred, and the court makes sure that the defendant saw the PSR. The reporters noted they had made some initial enquiries, and could learn more if the issue were referred to a subcommittee for in-depth review. Do defense lawyers always share documents that are served on them with their clients? If this is viewed as part of counsel's duty in representing clients, that might provide the foundation for a rule that the PSR should be provided to counsel, who would then share it with the defendant.

A practitioner member noted that there are pro se defendants in the system, and the member had thought that was why the rule referred to sending the PSR to the defendant. Then if you are housed in CCA, a federal BOP facility, you are not allowed to have your PSR, and you will have to have that kiosk or the law library or somewhere you could check out and look at those documents. The member also noted that there is new ABA standard for the defense that is much more particularized and calls for talking to your client about what is in the PSR.

Two practitioner members said they were unaware of any case in which the PSR had been sent directly to their clients. When a lawyer represents a client, he serves as the client's agent and can receive service on his behalf. All of the practitioner members agreed that this is how the system now works. It does not require direct service on represented defendants.

Professor Beale noted that there might still be a need to revise the rule, so that it conforms to the practice. Judge Molloy agreed, noting that there are now "jailhouse lawyers" demanding that the Probation Office provide PSRs directly to individual defendants, and this practice may spread. Professor Beale agreed that when you serve a represented party you generally serve the lawyer. However, she did not think that is what was envisioned by Rule 32(e)(2), which directed that copies go both the lawyer and the client. A judicial member commented that when he was a practicing defense attorney he would always receive two copies of the report. Until this discussion, he had never known why he got two copies of the report.

Judge Molloy concluded the discussion, saying that he would refer this matter to the Cooperators Subcommittee because it might fit hand and glove with the issues they are considering.

IV. Complex Criminal Litigation Manual

After our mini conference on how to deal with complex criminal matters, there was a suggestion that it would be useful to have a manual for complex criminal cases, similar to the

Manual for Complex Civil Litigation prepared by the Federal Judicial Center (FJC). This issue was referred to Judge Kethledge's Rule 16.1 Subcommittee.

Judge Kethledge stated that the FJC said they would be happy to assist, but they asked that we make suggestions for topics that might be included in such a manual. The Subcommittee had a telephone conference to consider topics, and the list it came up with is reflected on p. 271 of the agenda book. We also learned then that the FJC now generally contracts this sort of work out to private lawyers and academics, rather than preparing it in house. The FJC is also moving toward putting materials online rather than providing hard copies. Judge Kethledge noted that after consideration and discussion with the reporters he did not think there was much more for the Committee to do on this proposal. Given its small size and composition, the Subcommittee would not be well suited to guiding this project.

Professor Beale expressed enthusiasm for some of the changes being made by the FJC, such as putting materials directly online so that they will be readily accessible and can be updated frequently. The materials are also being reorganized and presented in a more user-friendly fashion. If the Committee feels this would be a useful project, the FJC would be willing to take the next steps, such as getting input on the most important topics from a broader group. She then invited Ms. Hooper to add her thoughts.

Ms. Hooper explained that the FJC will develop a special topics webpage focusing exclusively on complex criminal litigation. At the outset, it will be posting some of the publications it has done on national terrorism cases, its resource guide for managing death penalty litigation, and the manual on recurring problems in criminal trials. In addition, the FJC will review material that has been distributed at the magistrate and district judge workshops over the past few years, and may post those as well. The FJC will also be looking for guidance on new topics that could be developed and posted on the website.

Ms. Hooper said that it was not yet clear whether all of these materials would be available to the public as well as judges. At some of these workshops, judges participate with the understanding that the material will only be available to other judges; broader access to those materials is something that the FJC will have to work out.

Judge Campbell suggested that Judge Molloy's innovative procedures in the WR Grace prosecution should be considered for the website. This was a complex criminal case, and Judge Molloy used some innovative techniques, such as requiring the government to make certain pretrial disclosures at certain times, a ruling affirmed by the Ninth Circuit. Judge Campbell stated this technique has been invaluable in the Ninth Circuit to move criminal trials along and prevent surprise.

Another member stated that adequate funding for complex cases involving indigent defendants was an important topic. If there are a large number of codefendants, there will usually be CJA lawyers as well as federal defenders. In preparing the ESI protocol, they put CJA funding in as the first issue. These are really big and expensive, so the courts have to find ways to fund them adequately.

V. OTHER RULES SUGGESTIONS

A. Sentencing by Videoconference (17-CR-A)

Judge Donald E. Walter wrote the Committee suggesting an amendment to allow the option of sentencing by videoconference, where the judge would be at a remote location but defendant and all counsel would be in the courtroom.

Professor Beale introduced the proposal, noting that Rule 43 now specifies when a defendant must be present; Judge Walter's proposal is that unless the defendant objects and shows good cause, the court would have the option of sentencing by videoconference. The proposal raises the question whether it would be a good idea to allow sentencing by videoconference and, if so, under what circumstances. The reporters' memorandum recounted the Committee's prior consideration of videoconferencing. Under Rule 43(b)(2), if an offense is punishable by a fine and a sentence of no more than one year, defendants have the option of having the arraignment, plea, trial, and sentence done in absentia. In 2011, when the Committee was considering technology changes, it agreed also to allow sentencing by videoconferencing in these misdemeanor cases. The Committee concluded it would be desirable to allow a defendant who might otherwise choose to be sentenced in absentia to have the option of being sentenced by videoconferencing. But there was no support for further extending video sentencing. She noted that the memorandum describes some of the reasons why courts have concluded that videoconferencing is not the equivalent of in-person presence and may raise significant constitutional issues. The question for the Committee is whether to refer the proposal to a Subcommittee for more in-depth study.

In response to Judge Molloy's request for comments, multiple judicial members explained why they opposed an extension of sentencing by videoconference. There is a significant difference between proceedings conducted by videoconferencing and those done in person. One member noted that a judge who is in the same courtroom with the defendant can better determine whether the defendant understands the proceedings, and whether the defendant has been forced or threatened. Another noted that both the parties and the judge should be in the courtroom because there are such grave consequences for the individual defendant. A judicial member agreed, because "sentencing is the most human thing" that judges do. It is valuable to be in the same room as the defendant, because that allows the judge to understand the defendant in a way that would not be possible in a videoconference.

Members noted that the rules currently provide some flexibility, allowing judges and lawyers to work things out in unusual cases. Rule 43(c)(1)(B) now states that a defendant may be "voluntarily absent" at sentencing. There may be times when a defendant prefers not to come to court for sentencing. For example, a practitioner member described a case in which a defendant cooperated with the government and was out on bail when he was sentenced to time served by a video link to his home in Japan. Unlike the current rule, which anticipates that a defendant could be "voluntarily absent," Judge Walter's provision would allow the judge to elect to conduct the sentencing by videoconference unless the defendant objects and can show good cause.

Judge Campbell observed that current Rule 43(c) contemplates waiver only by behavior, rather than other forms of waiver. He wondered if the rule needed to be more explicit. Professor Beale responded that there had been no indication of a need for revision or clarification of Rule 43(c). Professor King noted that one may forfeit a right to be present by not raising it, adding that a written waiver requirement might make it more difficult to waive the right to be present. She also noted that although most of the Federal Rules do not include specific waiver provisions, you can waive the rights provided by the rules or stipulate that they won't apply, with the court's permission.

At the conclusion of the discussion, Judge Molloy stated that he would write to Judge Walter informing him that the Committee had considered his suggestion, reviewed the history of Rule 43, and concluded that no change in the rule is warranted.

B. Pretrial Disclosure of Expert Witness Testimony (17-CR-B)

Judge Molloy asked Mr. Wroblewski to comment on Judge Jed Rakoff's proposal for more pretrial disclosure of the testimony of expert witnesses. Over the last year, Wroblewski had worked closely with Judge Rakoff and the National Commission on Forensic Science, a federal advisory commission with authority only to advise the attorney general. The Commission recommended that the Attorney General change the Department's discovery practices, and its recommendations were adopted by then Deputy Attorney General Sally Yates. The new DOJ procedures are very similar to the civil rule. Both have different disclosure requirements, one a summary and the other more detailed, depending on the type of expert the party is hiring. If the party hires an expert for a particular case, a more detailed summary is required. Given the new DOJ policy, Mr. Wroblewski thought that amending the Criminal Rules to parallel the civil discovery rules would not make much difference in most cases. Mr. Wroblewski disagreed with the suggestion that without a rule, prosecutors would not follow that guidance. Federal prosecutors get discovery training every year. This year there is discovery training on expert witness testimony for all 6,000 criminal prosecutors.

Mr. Wroblewski informed the Committee that within a few days the Evidence Rules Committee would be holding a discovery conference and considering issues relevant to expert forensic evidence in criminal cases. Since the rules of admissibility might be amended, and the Department has adopted the recommended procedure and is training its prosecutors on the practice, he suggested that the Committee should defer action on Judge Rakoff's proposal.

A motion to table Judge Rakoff's suggestion was made, seconded, and approved by a voice vote.

VI. Discussion of Rule 16.1, Pretrial Discovery Conference

Judge Molloy introduced Professor Daniel McConkie, who had requested an opportunity to testify after the hearing had been cancelled. McConkie's written comments were not received in time for inclusion in the agenda book, but had been distributed to members. Judge Kethledge, chair of the Rule 16.1 Subcommittee, and Judge Molloy welcomed Professor McConkie and invited him to make a few comments.

Professor McConkie said he regretted not providing his comments before the Committee completed its work on the draft published for public comment, but he expressed the hope that they would still be useful. In summary, an amendment is warranted and the Committee's draft goes in the right direction, taking criminal discovery closer to civil discovery. Requiring the parties to confer about discovery would help them to regulate themselves. This requirement would help prosecutors, who generally want to comply with their discovery obligations but may find it hard to do so when they are not sufficiently familiar with the defense case. In his experience as an Assistant United States Attorney, Professor McConkie found it easier to comply with his discovery obligations if he spoke directly to defense counsel, and just had a conversation. It was not generally necessary to have a very long conversation.

Although Professor McConkie favored the adoption of the proposed rule, he also suggested a few "tweaks" for the Committee's consideration.

The first change Professor McConkie suggested was requiring that the conference be conducted in "good faith." He recognized that the Committee had discussed whether to include this language and decided not to do so. But he was concerned the Rule as written seems to be completely "voluntary," and it provides no remedy if one of the parties just goes through the motions of conferring. A good faith requirement would be helpful.

Professor McConkie also suggested going beyond the Committee's proposed "bare-bones rule," moving closer to the Civil Rule by requiring the parties to have a more structured discussion about what, when, and how discovery needs to be turned over. Finally, the parties should be required to submit a proposed order for the court. It is good practice to have a discovery order. It helps prosecutors fulfill their duties, and it helps the district court to enforce discovery obligations that are already in the rules and required by the Constitution.

In response to a question how his proposal would affect existing local rules and standing orders, some of which have a great deal of detail, Professor McConkie stated that it would change the practice if the local rules required less than the proposed national rule, but would not preclude local rules that now require more. He noted that the Committee has previously recognized that Rule 16 is not the only authority a judge has to regulate discovery, and accordingly his proposal would not defeat any local initiatives to regulate discovery in creative ways.

A practitioner member noted that as published the Committee Notes to Rule 16.1 reference the ESI protocol, which includes a report back to the court. Since the protocol already covers the report, it may not be necessary for the rule to require it. Also, the member noted, a report may be necessary only in the large discovery cases that need management.

Professor Beale observed that the Committee Note says that parties should be looking at best practices, giving the ESI protocol as an example. This builds in flexibility. The best practices could be a more or less detailed list or a report back to the judge. The proposed rule does not otherwise tie the hands of individual districts or judges. The Committee had concluded there was no need for a good faith requirement, but Professor McConkie had suggested this

would be a more serious signal to the parties. Professor Beale asked whether members had experience with counsel not fulfilling their obligations in good faith, and if this is indeed an issue.

A practitioner member noted he had initially favored adding the phrase "good faith," largely because it is in the Civil Rules, but he had been persuaded it was not necessary. The conversation reminded him, however, of the importance of requiring counsel to talk in real time to each other, which adds some gravitas to the meet and confer. He regretted the Standing Committee's decision to delete the requirement for an in-person meeting from the Rules Committee's proposed draft, and to allow conferences by telephone or Skype. Not explicitly requiring "good faith" is acceptable, but would be more satisfactory if the two parties always talked to each other in person. Deleting the requirement of a face-to-face meeting makes the conference a less meaningful event.

Professor King noted the requirements of "good faith" and meeting in person are related in another way. The Committee omitted "good faith" despite the fact that it created an inconsistency with Civil Rule 26. Later the Standing Committee deleted the requirement that the conference be in person, allowing it to be by telephone, in part to be consistent with the Civil Rule. Following that logic, she noted, would support adding "good faith" to the Criminal Rule.

Responding to a question about the effect of including "good faith," Professor McConkie said he had not done empirical work to see if the inclusion of the phrase had an effect on civil proceedings. A practitioner member doubted that it was necessary to include the words "good faith" in the Criminal Rule, noting that experience of practitioners during the discovery stage is now better in criminal than in civil cases, despite the inclusion of the words "good faith" in the Civil Rules. Moreover, in both civil and criminal cases he agreed the experience is better when counsel are speaking to one another.

Professor Beale noted that this discussion would be very helpful to the Rule 16.1 Subcommittee when it reviewed any other comments received during the notice and comment period.

VII. NEXT MEETING

Judge Molloy concluded the meeting with a reminder that the Standing Committee was meeting in January and the Committee would be meeting in Washington, D.C. on April 24, 2018. He also thanked the reporters and the Rules Staff.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 4, 2018 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting at the JW Marriott Camelback Inn in Scottsdale, Arizona, on January 4, 2017. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Daniel C. Girard, Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Judge Jack Zouhary

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

* Elizabeth J. Shapiro, Deputy Director of the Department of Justice's Civil Division, represented the Department on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve (by telephone)	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Julie Wilson (by telephone)	Attorney Advisor, RCS
Scott Myers (by telephone)	Attorney Advisor, RCS
Bridget Healy (by telephone)	Attorney Advisor, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He introduced the Committee's new members, Judge Srinivasan of the U.S. Court of Appeals for the District of Columbia, Judge Kuhl of the Los Angeles Superior Court, and attorney Bob Giuffra of Sullivan & Cromwell's New York Office, as well as other first-time attendees supporting the meeting.

He announced that Chief Justice Roberts appointed Cathie Struve Associate Reporter to the Standing Committee and that Dan Coquillette will retire as Reporter to the Standing Committee at the end of 2018. Dan Coquillette will continue to serve as a consultant to the Standing Committee. Judge Campbell thanked Professor Coquillette for his tremendous support and guidance throughout the years.

Judge Campbell also welcomed Judge Livingston as the new Chair of the Advisory Committee on Evidence Rules. He also informed the Standing Committee that Professor Greg Maggs was nominated to the U.S. Court of Appeals for the Armed Forces, and once confirmed, Professor Maggs will be ineligible to continue as Reporter to the Advisory Committee on Appellate Rules. He thanked Professor Maggs for his service.

For the new members, Judge Campbell explained the division of agenda items at the Standing Committee's January and June meetings. The January meeting tends to be an informational meeting with few action items, which is true for today's meeting. The January meeting typically serves to get the Standing Committee up to speed on what is happening in the advisory committees so that the Standing Committee is better prepared to make decisions at its June meeting, where proposals are approved for publication or transmission to the Supreme Court. The Committee's January meeting also serves to provide feedback to the advisory committees on pending proposals. Judge Campbell encouraged all Committee members to speak up on issues and topics raised by the advisory committees.

Rebecca Womeldorf directed the Committee to the chart, included in the Agenda Book, that summarizes the status of current rules amendments in a three-year cycle. This chart shows

the breadth of work underway in the rules process, whether technical or substantive rules changes. The chart also details proposed rules pending before the U.S. Supreme Court that, if approved, would become effective December 1, 2018. Between now and May 1, 2018, the Committee will receive word if the Supreme Court has approved the rules. If so, the Court and the Committee will prepare a package of materials for Congress. Around the end of April, there will be an order on the U.S. Supreme Court's website noting that the proposed rules have been transmitted to Congress. If Congress takes no action, this set of rules becomes effective December 1, 2018.

The chart also notes which proposed rules are published for comment and public hearings, whether in D.C. or elsewhere in the country. If there is insufficient interest, the public hearings are cancelled. So far, we have not had requests to testify about these published rules, but have received some written comments. These rules will most likely come before the Committee for final approval in June 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 12-13, 2017 meeting.**

TASK FORCE ON PROTECTING COOPERATORS

Judge Campbell and Judge St. Eve updated the Committee on the Task Force on Protecting Cooperators. Judge Campbell began by reviewing the origins of the Cooperators Task Force, from a letter by the Committee on Court Administration and Case Management ("CACM") detailing various recommendations to address harm to cooperators to Judge Sutton's referral of CACM's recommendation for various rules-related amendments to the Criminal Rules Committee. Director Duff also formed a Task Force on Protecting Cooperators to address various practices within the judiciary, the Bureau of Prisons ("BOP"), and the Department of Justice ("DOJ") that might address the problem in a comprehensive way.

Judge St. Eve provided an overview of the Task Force, noting that Judge Kaplan serves as Chair. She explained that the Task Force has explored what is driving harm to cooperators and what the Task Force can do to address the problem. There are four separate working groups within the Task Force – namely, a BOP Working Group, a CM/ECF Working Group, a DOJ Working Group, and a State Practices Working Group. Judge St. Eve reviewed the work completed or underway by each working group. The State Practices Working Group explored and did not identify any state practices that could be adopted by the federal courts to address harm to cooperators.

One challenge the Task Force faces is the variety of policies and procedures used by federal district courts across the country to reduce harm to cooperators, from the District of Maryland to the Southern District of New York. The DOJ Working Group is trying to synthesize and identify commonalities among disparate local policies and procedures.

The BOP Working Group found consistent themes and issues, and Judge St. Eve noted that BOP has been incredibly cooperative throughout this process. The BOP does not collect statistics documenting the extent of the harm to cooperators. Harm is occurring, primarily at high and medium security prisons, not low security facilities. Within these high and medium security prisons, prisoners are often forced by other inmates to "show their papers," such as sentencing transcripts and plea agreements, to demonstrate that they are not cooperators. These papers can be electronically accessed through PACER and CM/ECF.

As a result of these findings, the BOP Working Group will recommend that the BOP make these sentencing-related documents contraband within the prisons. Because some prisoners need access to these documents, BOP will work with wardens to establish facilities within the prisons where prisoners can securely access these documents. The Group is also recommending that BOP punish individuals for pressuring and threatening cooperators. Some recommended changes will require approval from BOP's union prior to implementation.

Another major issue is developing other types of limitations to place on PACER and CM/ECF to reduce the identification of cooperators, consistent with First Amendment and other concerns. On January 17, the CM/ECF Working Group will meet in Washington D.C. to hear from federal public defenders on this issue. The full Task Force meets on January 18.

Judge Campbell noted that the Committee does not have jurisdiction over BOP Policy or CM/ECF remote access. However, the question for the Committee is whether and what rules-based changes can be made to further help address this problem.

Judge Bates asked whether the Task Force has received any feedback from the defense bar about limiting incarcerated individuals' access. Judge St. Eve noted that a federal defender is on the Task Force and that federal defenders support limiting access within BOP so long as prisoners can still access their documents when necessary for appeals and other court proceedings.

Professor Coquillette asked why the BOP cannot collect empirical data, and Judge St. Eve responded that the Task Force considered proposing such a recommendation. The Task Force decided against this recommendation after the BOP voiced concerns that collecting the data will create more harm than good. Judge Campbell noted the FJC survey, which provides anecdotal evidence in which judges reported over 500 instances of harm to cooperators, including 31 murders, and that much of this harm stemmed from the ability to identify cooperators from court documents. This FJC survey was a major impetus for the CACM letter. One committee member noted that he believes that the problem of harm to cooperators is better addressed by the BOP, instead of through rules changes. Judge St. Eve emphasized that BOP officials – especially BOP staff working at high and medium security facilities – know that harm to cooperators is a problem and are committed to better addressing it.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy provided the report of the Advisory Committee on Criminal Rules, focusing largely on the Advisory Committee's decision to oppose adopting CACM-recommended rules to reduce harm to cooperators. As noted earlier, CACM recommended that the Standing Committee amend various criminal rules to reduce harm to cooperators. The Committee referred the CACM recommendation to the Criminal Rules Committee, which created the Cooperator Subcommittee, also chaired by Judge Kaplan.

At the Advisory Committee meeting in October 2017, the Cooperator Subcommittee presented its research and recommendations about CACM-based rules amendments. In drafting rule amendments consistent with CACM's proposal, the Subcommittee balanced competing interests – namely, transparency and First Amendment concerns with harm reduction concerns. After many meetings, the Subcommittee concluded that amendments to Criminal Rules 11, 32, 35, 47, and 49 would be required to implement CACM's recommendations, and the Subcommittee drafted these amendments for further discussion.

The Subcommittee's draft amendments engendered a lively discussion at the Advisory Committee meeting. Judge Kaplan and the DOJ abstained from voting. The Advisory Committee as a whole voted on two questions. First, the Advisory Committee unanimously agreed that the draft rules amendments would implement CACM's proposals. Second, the Advisory Committee agreed, albeit with two dissenting votes, not to recommend these amendments.

With this overview, Judge Molloy sought discussion about whether the Committee agreed with the Advisory Committee's decision. To assist the Committee, Professors Beale and King provided an overview of the various proposed amendments to Criminal Rules 11, 32, 35, 47, and 49, that had been considered.

One Committee member questioned how defense bar advocacy is impaired when plea agreements are sealed on a case-by-case basis because defense attorneys are not losing any information that they otherwise would have. Professor King noted that sealing practices vary district-by-district, so a rule about sealing on a case-by-case basis would not reduce access to that information in districts that rarely or never seal. Professor King also noted that the defense bar indicated that the terms of plea agreements are important, that they need this information in order to assess their client's proposed plea agreement, and that sealing plea agreements in every case would impair their ability to do this. Another member asked about whether sealing the plea agreements in every case would prevent others from identifying cooperators. Professor Beale responded that it would prevent others from identifying cooperators through plea agreements, but that there are other ways to learn about cooperators – through lighter sentences, Brady disclosures, etc. She articulated that the Advisory Committee did not think that Rule 11 was an effective response to the problem, especially given that this rule change would be a transition to secrecy.

One member asked whether constitutional challenges have been raised in districts that have implemented aggressive sealing tactics in order to protect cooperators. Judge St. Eve noted that she is not aware of any constitutional challenges. This may reflect that these districts have received buy-in as to sealing practices from prosecutors, defenders, and judges prior to implementation. Professor Beale noted that some instances of constitutional challenges by an individual do exist.

Judge Campbell interjected to respond to a few comments raised by committee members. First, he stated that there is no way to absolutely prevent cooperator identity from becoming known but that this does not mean steps cannot be taken that will reduce the dissemination of such information. Moreover, there seem to be ways to reduce the identification of cooperators without increased sealing, whether by changing the appearance of the docket on CM/ECF or adopting the "master sealed event" approach implemented in the District of Arizona. Judge Campbell emphasized that the Advisory Committee should not give up on amendments that would not result in more secrecy.

More generally, many Committee members asked questions about the overall implications of CACM-based rules changes. One member inquired whether these rules changes would (negatively) affect non-cooperators who would no longer be able to demonstrate their non-cooperation status. Professor King noted that this is a tricky issue and that the effect of rule-based changes on non-cooperators is one reason why the defense bar has no unanimous position on this topic. Another member asked whether the CACM-based rules changes would encourage more cooperation. From the Task Force perspective, Judge St. Eve said it is not part of the Task Force's mission to consider whether rules or policy changes would encourage more cooperation. The Task Force's charter focuses on ways to reduce harm to cooperators. One member voiced support for more judicial education on how to reduce harm to cooperators.

Another member noted that harm to cooperators has been occurring long before CM/ECF and that cooperator information can be learned from many sources other than CM/ECF. This member asked whether the Task Force believed that there would be some benefit from a national policy instead of the disparate local policy approach. Judge St. Eve stated that the Task Force thinks a national policy is the best option, and the DOJ is considering a national approach as well. However, due to local variation, the Task Force is facing the challenging question of what that national policy should be. Professor Capra noted that in 2011 a Joint CACM/Rules Committee considered this issue and determined that a national policy or approach is not feasible. Judge St. Eve stated that the Task Force is aware of this 2011 conclusion. Professor Beale noted one advantage to a rules-based change is that proposed rules would be published for public comment. In addition, rules promulgated through the Rules Enabling Act process would also obviously have national enforcement effect.

In light of this discussion, Judge Campbell asked whether the Committee agreed with the Advisory Committee's decision not to adopt the CACM rules-based changes. Before soliciting feedback, Judge Campbell noted that the DOJ did not take a position on these CACM rules-based amendments because DOJ wants to wait until the Task Force concludes its work. He also stated that some Advisory Committee members questioned whether the Advisory Committee

could revisit rules changes depending on the outcome of the Task Force's work. Unless the Committee disagrees with the decision not to adopt the CACM rules-based changes at this time, the Advisory Committee opted, if necessary, to revisit these rules after the Task Force concludes its work.

Many members voiced agreement with the Advisory Committee's decision to reject the CACM rules-based amendments. One member supported the District of Arizona's approach, and another noted that, without empirical data about the causes of the problem, the Advisory Committee's position seemed wise. This member also stated that CM/ECF seems to be a problem and that CM/ECF should be changed. Another member thought consideration of any rules changes should wait until the CM/ECF Working Group makes its recommendations. One member suggested that achieving a national policy is difficult and the source of the problem stems from the BOP. This member believed that the harms from rules-based changes exceed the benefits.

Judge Molloy concluded his report by providing updates about the Advisory Committee's other work. After the mini-conference on complex criminal litigation, the Advisory Committee recommended that the FJC prepare a Manual on Complex Criminal Litigation, which would parallel the Manual on Complex Civil Litigation. The Advisory Committee is also considering a few new rules amendments. First, the Cooperator Subcommittee is considering amending Rule 32(e)(2) to remove the requirement to give the PSR to the defendant. This change could help address one aspect of the cooperator identification problem. Second, the Advisory Committee rejected a proposal to amend Rule 43 to permit sentencing by videoconference. Third, the Advisory Committee is considering re-examining potential changes to Rule 16 regarding expert disclosure in light of an article by Judge Paul Grimm. Lastly, the Advisory Committee is considering changes to Rule 49.2, which would limit remote access in criminal cases akin to the remote access limitations imposed by Civil Rule 5.2. However, the Advisory Committee is holding in abeyance its final recommendation on this rule change until after the Task Force concludes its work.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates presented the report of the Advisory Committee on Civil Rules, which included only informational items and no action items.

Rule 30(b)(6): The Subcommittee on Rule 30(b)(6) began with a broad focus, but it has narrowed the issues under consideration, primarily through examination and input from the bar. There is little case law on this topic in part because these problems are often resolved before judicial involvement or with little judicial involvement. The Subcommittee received more than 100 written comments on its proposed amendment ideas, and the feedback revealed strong competing views, often dependent upon whether the commenter typically represents plaintiffs or defendants.

Based on this input, the Subcommittee on Rule 30(b)(6) is focusing on amending Rule 30(b)(6) to require that the parties confer about the number and description of matters for

examination. The Subcommittee is, however, still tinkering with the language. The Subcommittee is also receiving additional input on some select topics, including whether to add language to Rule 26(f) listing Rule 30(b)(6) depositions as a topic of consideration.

In terms of timeline, the Subcommittee will make a recommendation to the Advisory Committee at its April 2018 meeting. Its recommendation, if any, will be presented to the Standing Committee in June 2018.

One member asked why the judicial admissions issue was eliminated as an issue to be addressed. The Subcommittee concluded that there is little utility to a rules-based approach to this problem. Although tension in the case law exists, the cases are typically sanction-based cases related to bad behavior. The Subcommittee is concerned that a rule change directed to the judicial admissions issue could create more problems than it would solve.

Some members voiced support for adding a "meet and confer" element to Rule 30(b)(6), noting that it would help encourage parties to agree on the topics of depositions before the deposition and thereby reduce litigation costs. Others were skeptical that the parties would actually meet and confer to flesh out topics for the depositions. One member suggested that the benefit of this rule change would not exceed the work necessary to change the rule. Judge Campbell noted that this is a unique problem for a frequently used discovery tool. The Advisory Committee investigated this problem ten years ago and concluded that it was too difficult to devise a rule change to reduce the problem. Based on the comments raised, Judge Campbell wondered whether education of the bar, through a best practices or guidance document for Rule 30(b)(6), may be a better solution than a rule change.

Social Security Disability Review: The Administrative Conference of the United States ("ACUS") proposed creating uniform procedural rules governing judicial review of social security disability benefit determinations by the Social Security Administration. The Social Security Administration supports ACUS's proposal. The Advisory Committee is in the early stages of considering this proposal, and in November 2017, it met with representatives from ACUS, the Social Security Administration, the DOJ, and claimants' representatives. At this meeting, it became clear that a rules-based approach would not address the major issues with respect to social security review, including the high remand rate, lengthy administrative delays, and variations within the substantive case law governing social security appeals.

The Advisory Committee created a Social Security Subcommittee to consider the ACUS proposal. The Subcommittee will focus on potential rules governing the initiation of the case (e.g., filing of a complaint and an answer) and electronic service options. The Subcommittee will not consider special rules for discovery because this does not appear to be a major issue.

Some broad issues remain for the Subcommittee's determination, including the kind of rules it would devise, the placement of the rules (e.g., within the Civil Rules), concerns relating to substance-specific rulemaking, and whether to devise procedural rules for all administrative law cases. The Subcommittee thus far is not inclined to draft procedural rules for all types of administrative law cases, which can vary greatly. Although the Social Security Administration

would like rules regarding page limits and filing deadlines, the Civil Rules do not typically include such specifications. The Subcommittee will provide an update to the Advisory Committee at its April meeting and to the Standing Committee in June.

One member asked about transsubstantivity, noting that the admiralty rules do not fit well within the Civil Rules and that rules governing judicial review of one administrative agency seem to raise even greater transsubstantivity concerns because such rules would be less general. This member asked whether the Subcommittee has considered that procedural rules for all administrative law cases would seem to raise fewer transsubstantive concerns than social security rules alone. Judge Bates said that the Subcommittee has not considered this issue yet but will be considering transsubstantivity concerns. Professor Cooper raised an empirical question about the extent to which all administrative law review cases focus primarily or solely on the administrative record.

One member encouraged the Subcommittee to consider Appellate Rules 15 and 20 when devising particular rules governing review of social security benefits decisions. Professor Struve seconded this suggestion. Another member asked about how the specialized rules for habeas corpus and admiralty came about under the Rules Enabling Act. Professors Cooper and Marcus provided an overview of the formation of these rules and noted that the habeas corpus rules are a good analogy for creating specialized rules for social security decisions.

Another member asked whether the Subcommittee is considering the patchwork of local district court rules governing social security review. The Subcommittee is looking at the panoply of local rules and how these rules impact the time for review at the district court level. Professor Cooper noted that there is not a wide divergence in the amount of time it takes courts to review social security decisions. Judge Campbell noted that 52 out of 94 district courts have their own procedural rules and that, according to the Social Security Administration's estimates, uniform rules would save the agency around 2-3 hours per case. Because the Social Security Administration handles around 18,000 cases per year, uniform rules would result in significant cost savings for the agency.

Multidistrict Litigation ("MDL") Proceedings: The Advisory Committee has received some proposals to draft specialized rules governing MDL proceedings, some of which parallel legislation pending in Congress such as HR 985. Business and defense interests have submitted these proposals, and none is from the plaintiff side. Judge Bates provided an overview of these various proposals, noting the focus on mass tort litigation.

The Advisory Committee has created an MDL Subcommittee, headed by Judge Bob Dow (who also headed the Class Action Subcommittee). The Subcommittee has a significant amount to learn. The Subcommittee has received written comments from the defense bar but it has yet to hear from the plaintiffs' bar, the Judicial Panel on Multidistrict Litigation, judges who have handled significant numbers of MDLs, and the academic community. The Subcommittee is currently creating a reading list as well as identifying research projects. The Subcommittee also has to explore how it wants to proceed, and given these factors adoption of rules, if any, will be a long and careful process. The Subcommittee will take six to twelve months gathering

information. Judge Campbell clarified that the Rules Enabling Act process guarantees that it would take at least three years before any rules are adopted (assuming any are proposed), but that these proposals are receiving careful attention.

Some members noted that this an important and valuable area to investigate given that MDLs comprise a significant portion of the federal docket. Because these cases often require considerable flexibility, innovation, and discretion, others expressed skepticism about the necessity or ability to devise a specialized set of rules for MDL proceedings. Another member noted that devising such rules may be difficult given that mass tort MDLs raise different issues and problems than antitrust MDLs, for example.

One member suggested that the Subcommittee consider the process for appointing lead counsel in light of Civil Rule 23(g)'s objective standard and how lead counsels are appointed under the Private Securities Litigation Reform Act. Another member recommended speaking with experienced MDL litigators. Other members recommended attending a variety of MDL conferences occurring around the country in 2018 as well as considering the best practices materials complied by the MDL Panel.

Third-Party Litigation Finance: The Advisory Committee has received a proposal which would require automatic disclosure of third-party litigation financing agreements under Rule 26(a)(1)(A)(v). Although this proposal does not pertain only to MDLs, the MDL Subcommittee is charged with exploring it. The Advisory Committee considered similar proposals in 2014 and 2016 but did not recommend any changes to the Civil Rules. Like the previous proposals, this proposal presents a definitional problem regarding what constitutes third-party litigation financing. It is also controversial, with a clear division between the plaintiff and defense bars, and it presents significant ethical questions. It is not clear that the Advisory Committee would have reconsidered this proposal again so soon, but because third-party litigation financing issues were raised within the MDL proposals, the Advisory Committee decided to examine these issues further as part of the rulemaking proposals for MDLs.

Other Proposals: The Advisory Committee received a proposal to amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The Advisory Committee will further explore this proposal, and the Department of Justice has indicated that it does not have a problem with eliminating the preference. The Advisory Committee wants to further explore the implications of eliminating the preference.

Another proposal received by the Advisory Committee was to amend Rule 16 so that a judge assigned to manage and adjudicate a case could not also serve as a "settlement neutral." The Advisory Committee removed this matter from its agenda because it is not clear that there is a problem that a rule amendment could or should solve.

The Advisory Committee was also asked to explore the initial discovery protocols for the Fair Labor Standards Act – a request which parallels earlier efforts regarding initial discovery protocols for employment cases alleging adverse action. The Advisory Committee hopes judges

consider these protocols favorably, but it did not think the Advisory Committee should endorse these protocols. The Advisory Committee concerns itself with rules adopted through the Rules Enabling Act process and does not endorse work developed by other entities outside the rulemaking process.

Pilot Project Updates: Two courts, the District of Arizona and the Northern District of Illinois, have enlisted in the Mandatory Initial Discovery project. It is too early to report feedback on its results. Judge Campbell noted that the project has been going well in the District of Arizona, stating that initial feedback has been positive and that the district has experienced fewer issues than expected. He suspects, however, that problems may arise during summary judgment and trial phases for cases filed after May 1 when parties request that district judges exclude evidence not disclosed during the mandatory initial discovery periods. The district judges in Arizona are anticipating this and are prepared to handle the problems as they arise. Judge Campbell also applauded the FJC's efforts with developing and implementing this project. Judge St. Eve reported that the Mandatory Initial Discovery project rolled out very smoothly in the Northern District of Illinois and that the district has received positive feedback thus far.

The Expedited Procedures project has been stalled for want of participating district courts. The Advisory Committee has enlisted Judge Jack Zouhary to spearhead its efforts to drum up participation. The Advisory Committee has found courts often indicate initial support for the pilot, but ultimately decline to participate. Their support typically wanes due to vacancies, caseloads, or lack of unanimous participation by judges within a district. The project's requirements have been modified to permit more flexibility and to allow for less than unanimous participation by district judges within a given district.

Judge Zouhary noted his district agreed to participate in the Expedited Procedures project because his district already had similar rules in place, albeit using different terminology. A letter of endorsement for the project has been drafted, and some organizations, including the American College of Trial Lawyers, the Federal Bar Association, the FJC, the NYU Civil Jury Project, and the American Board of Trial Advocates, have expressed excitement for the project and are considering joining the letter.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta gave the report of the Advisory Committee on Bankruptcy Rules. At its September 2017 meeting, the Advisory Committee recommended publishing changes to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because the proposed amendments relate to a bankruptcy rule and an appellate rule that were published in August 2017, however, the Advisory Committee is waiting to review any comments before finalizing proposed language. The Advisory Committee plans to present the proposed changes at the Committee's June meeting.

Judge Ikuta discussed four additional information items: (1) withdrawal of a prior proposal to amend Rule 8023 (Voluntary Dismissals), (2) updates to national instructions for bankruptcy forms, (3) a suggestion to eliminate Rule 2013 (Public Record of Compensation

Awarded to Trustees, Examiners, and Professionals), and (4) preliminary consideration of a proposal to restyle the bankruptcy rules.

The Advisory Committee decided to withdraw its prior recommendation to amend Rule 8023. Judge Ikuta said the proposed amendment was intended to be a reminder that a bankruptcy trustee who is party to an appeal may need bankruptcy court approval before seeking to dismiss the appeal. The Advisory Committee's Department of Justice representative raised a concern, however, that the change would be difficult for appellate clerks to administer. The Advisory Committee agreed that the proposed amendment could cause confusion, which outweighed the benefit of the proposed change. It therefore voted to withdraw the proposal from consideration.

The Advisory Committee updated national instructions for certain forms. Judge Ikuta explained that the December 1, 2017 amendments to Rule 9009 (Form) restricted the ability of bankruptcy courts to modify official forms, with certain exceptions. One exception allows for modifications that are authorized by national instructions. After learning the courts routinely modify certain notice-related forms to provide additional local court information, and that model court orders included as part of some official forms are often modified by courts to provide relevant details, the Advisory Committee approved national instructions that would permit these practices to continue.

The Advisory Committee is also looking into a suggestion from a bankruptcy clerk that it should eliminate or amend Rule 2013. The intent of the rule is to avoid cronyism between the bankruptcy bar and the courts. It requires the bankruptcy clerk to maintain a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and to provide an annual report of such fees to the United States trustee. The suggestion stated that compliance with this rule is spotty, and because a report regarding fees can be generated and provided on request, there is no need to keep systematic records. Judge Ikuta said that the Advisory Committee, with help from the FJC, will gather more information about current compliance with the rule before taking any steps. It expects to consider the issue at its spring 2018 meeting.

Finally, the Advisory Committee is considering whether it should commence the process of restyling the Bankruptcy Rules. The Advisory Committee is taking a phased approach before making this big decision. First, it is studying whether any restyling is warranted, given the close connection of the Bankruptcy Rules to the Bankruptcy Code and the use of many statutory terms throughout the rules. The Advisory Committee will also consider the views of its stakeholders, and it has asked the FJC to help it obtain input from users of the Bankruptcy Rules regarding the pros and cons of restyling. Because any input would be more meaningful and valuable if bankruptcy judges and practitioners could consider some exemplars of restyled rules, the Advisory Committee has asked the Committee's style consultants to assist in developing such exemplars from the eight rules in Part IV of the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston provided the report for the Advisory Committee on Evidence Rules. The Advisory Committee met on October 26 and 27, 2017, at the Boston College Law School,

where the law school and Dean Vincent Rougeau were gracious hosts. She advised that she had no action items to report, but that there were several information items.

The Advisory Committee held a symposium in connection with its meeting. The symposium focused on forensic expert testimony, Rule 702, and Daubert. The topics discussed included the 2016 President's Council of Advisors on Science and Technology's ("PCAST") report on forensic science in criminal courts and a potential "best practices" manual. The conference participants shared an interest in ensuring that expert testimony comported with Rule 702, but the focus was not on potential amendments to Rule 702, but instead, the applications of the rule. Some conference attendees suggested that a best practice manual might be more helpful than potential rule amendments. Judge Livingston stated that the Advisory Committee will discuss the findings from the conference at its spring 2018 meeting.

Judge Campbell noted that a panel of judges and lawyers at the Boston College event also raised concerns about possible abuses of Daubert motions in civil cases, and he suggested that the Civil Rules Advisory Committee be apprised of these concerns. Dan Capra noted a potential circuit split related to the admissibility of forensic evidence.

Next, Judge Livingston advised that the Advisory Committee published a proposed amendment to Rule 807, and that the public comment period is open until mid-February. The Advisory Committee will discuss all comments at its meeting in the spring.

The Advisory Committee is also considering a possible amendment to Rule 801(d)(1)(A) (prior inconsistent statement under oath). It sought informal input on a possible amendment in the fall of 2017, and it also obtained results from a survey conducted by the FJC. The Advisory Committee will consider the input at its spring meeting. A committee member noted that one possible area of consideration for the Advisory Committee is jury instructions regarding prior consistent statements.

The Advisory Committee is considering a possible amendment to Rule 404(b) (crimes, wrongs, or other acts); however, disagreement exists within the Advisory Committee regarding a circuit split between the Third and Seventh Circuits. There is further disagreement about how the rule is being employed, and the Advisory Committee has discussed the three principal purposes of the rule, including the chain of reasoning, the balancing test, and additions to the notice provision. Judge Campbell noted the similarities to the discussion surrounding Civil Rule 30(b)(6), where there is a disagreement regarding whether an amendment is needed. Another member added that while much of the discussion is about criminal cases, any changes would impact civil cases as well.

Other items that will be considered by the Advisory Committee at its spring meeting include possible amendments to Rule 606(b) (in light of the Supreme Court's decision in *Pena-Rodriguez v. Colorado*) and to Rules 106 and 609(a)(1).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares provided the report for the Advisory Committee on Appellate Rules, which included several informational items and one discussion item. First, as to the discussion

item, Judge Chagares reviewed the proposed amended rules pending before the Supreme Court for consideration, including the proposed amendments to Rule 25(d). The proposed amendment to Rule 25(d) would eliminate the requirement of proof of service when a document is filed through a court's electronic-filing system, replacing "proof of service" with "filed and served." Given the pending amendment to Rule 25(d), the Advisory Committee decided that references to "proof of service" in Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) should be removed. Judge Chagares explained that these proposed amendments are technical and that the Advisory Committee did not believe publication of the technical changes was necessary.

During this discussion, several committee members raised concerns about the use of "filed and served" in Rule 25(d), suggesting elimination of the term "and served." Judge Campbell noted that while a document filed electronically is served automatically, those not filed electronically need the instruction in the rule. Committee members made suggestions for various stylistic edits to the proposed rule amendments, and the Committee's style consultants offered their views on the proposed language and edits, including present versus past tense. One committee member raised concerns about eliminating the proof of service language in Rule 39, given the subject-matter of the rule. Judge Campbell suggested adding to the committee notes an instruction regarding service and a reference to Rule 25. The group discussed possible language for the committee notes, and Judge Campbell recommended that the Advisory Committee consider these comments and present the revised package of rules and committee notes to the Committee in June, after consideration of the discussion at the meeting.

Following this meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d) from the Supreme Court's consideration. The Advisory Committee will consider the comments made at the Standing Committee meeting regarding Rule 25(d), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and it will present an amended set of proposed rule amendments for the Committee's consideration at its June 2018 meeting.

Judge Chagares reviewed several information items. The Advisory Committee considered at its November 2017 meeting a suggestion to amend Rule 29 to permit cities and Indian tribes to file amicus briefs without leave of court. The Advisory Committee considered but deferred action on the proposal five years ago, and after discussion at its November 2017 meeting, the Advisory Committee decided to take no further action. It is a problem that rarely, if ever, arises in litigation. Judge Campbell noted that most Indian tribes appear before federal court via private firms, not through government lawyers, and this could cause more recusal issues.

Judge Chagares advised that the Advisory Committee considered several other issues at its November 2017 meeting. These included a proposal to amend Rule 3(c)(1)(B), which as currently drafted may present a potential trap for the unwary. After discussion, a subcommittee was formed to study the issue. The Advisory Committee also considered a suggestion to amend Rules 10, 11, and 12 in light of advances made with electronic filing and the impact on the record on appeal. After discussion, the Advisory Committee determined that most clerks' offices have procedures to manage these issues, and that with upcoming upgrades to CM/ECF, some issues raised may be resolved. The Advisory Committee thus determined to remove the

suggestion from its agenda. The Advisory Committee discussed a potential issue related to Rule 7 and whether attorney fees are "costs on appeal" under the rule. The Advisory Committee determined to inform the Civil Rules Committee of the issue and to form a subcommittee to monitor any developments.

Finally, Judge Chagares noted several items that the Advisory Committee may consider at upcoming meetings, including concerns about judges deciding issues outside of those addressed in briefing, the use of appendices, and the dismissal of appeals after settlement agreements. A Committee member raised a concern that the dismissal issue could be substantive rather than procedural, and Judge Chagares stated that this concern would be considered by the Advisory Committee when the issue is discussed.

REPORT OF THE ADMINISTRATIVE OFFICE

Rebecca Womeldorf provided the report from the Rules Committee Staff ("RCS"). The Standing Committee reviewed Scott Myers' report regarding instances where committees need to coordinate regarding proposed rule changes which implicate other rules. Ms. Womeldorf added that treatment of bonds for costs on appeal under Appellate Rule 7 and treatment of the proof of service references across the Appellate and Civil Rules will continue to require coordination between these various committees.

Julie Wilson provided an overview of congressional activity implicating the Federal Rules. In general, Ms. Wilson noted that, although the RCS is monitoring many pending bills, not much movement has occurred in the past few months. Ms. Wilson first briefly reviewed pending congressional legislation which would directly amend the Federal Rules. The Senate Judiciary Committee held in November 2017 a hearing on "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators," which focused on a variety of bills which would directly amend the Federal Rules, including the Lawsuit Abuse Reduction Act ("LARA"). No action, however, has occurred regarding these pieces of legislation, including LARA, since that hearing. The RCS continues to monitor these bills for further development.

The RCS has also offered mostly informal feedback and comments to Congress on other bills which would not directly amend but rather require review of the Federal Rules by the Standing Committee. This includes the Safeguarding Addresses from Emerging (SAFE) at Home Act, which was introduced in September 2017 by Senator Roy Blunt and would require federal courts and several agencies to comply with state address confidentiality programs. This proposed legislation raises concerns about service under the Federal Rules, and RCS communicated this feedback to Senator Blunt's staffer but has not heard anything in response. Representative Bob Goodlatte also introduced in October 2017 the Article I Amicus and Intervention Act, which would limit federal courts' authority to deny Congress's ability to appear as an amicus curiae. The RCS communicated its concern to congressional staffers that this legislation would lengthen the time of appeals.

A few developments occurred in the past month as well. On November 30, 2017, the House Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on "The

Role and Impact of Nationwide Injunctions by District Courts." Although the hearing did not concern a specific piece of legislation, Rep. Goodlatte reiterated his interest in this issue, and Professor Samuel Bray, who submitted a proposal to the Civil Rules Committee earlier this year regarding nationwide injunctions, spoke at this hearing. The RCS will continue to monitor for the introduction of any specific pieces of legislation regarding nationwide injunctions.

The Committee lastly considered what advice it could provide to the Executive Committee regarding which goals and strategies outlined in the *Strategic Plan for the Federal Judiciary* should receive priority attention over the next two years. After discussion, the Committee authorized Judge Campbell to report the sense of the Committee on these issues to the Judiciary's Planning Coordinator.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the Committee members and other attendees for their participation. The Committee will next meet on June 12, 2018, in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB C.2

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Agenda E-19 (Summary)
Rules
March 2018

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

- Federal Rules of Appellate Procedure .....pp. 2–4
- Federal Rules of Bankruptcy Procedure .....pp. 4–6
- Federal Rules of Civil Procedure.....pp. 6–11
- Federal Rules of Criminal Procedure.....pp. 11–14
- Federal Rules of Evidence .....pp. 14–16
- Judiciary Strategic Planning .....p. 17

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee) met on January 4, 2018. All members were present.

Representing the advisory rules committees were: Judge Michael A. Chagares, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, and Professor S. Elizabeth Gibson, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter (by telephone); Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff (by telephone); Patrick Tighe, Law Clerk to the Standing Committee; and Dr. Tim Reagan and

Dr. Emery G. Lee III, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on November 9, 2017, and discussed the following items.

Proposal to Amend Rules to Address References to "Proof of Service"

A proposed amendment to Appellate Rule 25(d) that eliminates the requirement of proof of service when a party files a paper using the court's electronic filing system was approved by the Conference at its September 2017 session. (JCUS-SEP 17, p. 3) The advisory committee subsequently identified references to "proof of service" in Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1), that require corresponding amendments. The advisory committee determined after discussion that the proposed corresponding changes to remove or revise references to "proof of service" in each of these rules are properly seen as technical corrections for which publication for additional comments is unnecessary.

Upon further review of the proposed amendment to Appellate Rule 25(d) discussed above, and subsequent to its meeting on November 9, 2017, the advisory committee identified a wording change to the pending amendment that will clarify the intent of the rule change. This is a technical change for which publication for additional comments is unnecessary. To permit this change to be made prior to Supreme Court approval of the pending amendment to Rule 25(d), and to allow all Appellate Rule amendments addressing proof of service to proceed together, the advisory committee determined by e-mail vote to recommend withdrawing the proposed amendment to Rule 25(d) now pending before the Supreme Court and the Standing Committee agreed. The advisory committee intends to submit proposed amendments to Rules 5(a)(1),

21(a)(1) and (c), 25(d), 26(c), 32(f), and 39(d)(1), for approval at the Standing Committee's June 12, 2018 meeting, and ask the Judicial Conference to approve the withdrawal and new proposed amendments at its September 2018 session. The Committee agreed with all of the advisory committee's recommendations.

Revisiting Proposals to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs Without Leave of Court or Consent of the Parties

Rule 29(a) allows federal and state governments to file amicus briefs without leave of court or consent of the parties. At its April 2012 meeting, the advisory committee considered a suggestion to permit Indian Tribes and cities to file amicus briefs without leave of court or consent of the parties. The advisory committee determined to take no action on the suggestion, with an explanation that the advisory committee would revisit the item in five years. The advisory committee did so at its fall 2017 meeting, and determined that there remained no evidence that Indian Tribes or cities had been denied opportunity to file amicus briefs under the existing rule. Absent such evidence, and given the potential complications and ramifications of a rule change, the advisory committee decided to take no further action on the suggestion.

Rule 3(c)(1)(B) and the Merger Rule

Appellate Rule 3(c)(1)(B) requires a notice of appeal to "designate the judgment, order, or part thereof being appealed." In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. The advisory committee received a suggestion to revise the rule to eliminate the possible "trap for the unwary" reflected in the Eighth Circuit's interpretation of Rule 3(c)(1)(B). Following discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to study this issue to determine if any action should be taken on the suggestion.

Circuit Split on Whether Attorney's Fees Are "Costs on Appeal" Under Rule 7

A circuit split has arisen on the question of whether attorney's fees are "costs on appeal" for purposes of calculating the amount of a bond under Appellate Rule 7. After discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to investigate this issue, and will consult with the Civil Rules Advisory Committee on any resulting rule proposal.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Information Items

The Advisory Committee on Bankruptcy Rules met on September 26, 2017, and discussed the following items.

Rules 2002(h) and 8012

The advisory committee considered amendments to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Both proposals relate to other proposed amendments currently published for public comment. Because the related rules have not yet been finalized, the advisory committee plans to present the proposed amendments to Rules 2002(h) and 8012 at the Standing Committee's June 2018 meeting.

Withdrawal of Proposed Amendment to Rule 8023 (Voluntary Dismissal)

In August 2016, the advisory committee published for public comment a proposed amendment to Rule 8023, which governs voluntary dismissal of an appeal. The proposed amendment added a cross-reference to Rule 9019, which requires a bankruptcy trustee to get bankruptcy court approval of a compromise or settlement. The advisory committee recommended the amendment in response to a suggestion that appellate courts might be unaware that a bankruptcy trustee's ability to seek the dismissal of an appeal may be subject to bankruptcy court approval.

Although no comments addressing the proposed amendment were filed, the Department of Justice expressed concern at the advisory committee's spring 2017 meeting that the proposed amendment might create administration difficulties because it seemed to require the clerk or the appellate court to determine the applicability of Rule 9019 with respect to every voluntary dismissal of a bankruptcy appeal. The advisory committee considered the Department of Justice's concerns over the summer. After surveying the case law and finding no decision addressing the circumstance of a trustee voluntarily dismissing an appeal without complying with Rule 9019, the advisory committee decided an amendment to Rule 8023 was not needed and could cause confusion.

Approval of National Instructions Authorizing Alterations

The 2017 amendments to Rule 9009 restrict authority to make alterations to Official Bankruptcy Forms and provide as a general matter that "[t]he Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration." The rule was amended to ensure that a form, such as the Chapter 13 Plan Form, which is intended to provide information in a particular order and format, is not altered.

Rule 9009 includes exceptions to the general prohibition against altering Official Forms. One of those exceptions allows for alterations as provided in the "national instructions for a particular Official Form." In response to suggestions from several bankruptcy courts, the advisory committee approved national instructions for certain forms that would allow for limited modifications such as the cost-saving practice of adding local court information to the official form notice of a bankruptcy case.

Suggestion to Amend Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals)

The advisory committee received a suggestion from a bankruptcy clerk questioning the need for Rule 2013. The rule requires the bankruptcy clerk's office to compile and maintain a

public record of all fees awarded by the court to trustees, attorneys, and other professionals, and transmit the record to the U.S. trustee's office. The clerk asserts that CM/ECF has eliminated the need for the type of records Rule 2013 was designed to produce because reports about fee awards can now be generated on demand. The advisory committee is working with the FJC and will seek information from the U.S trustee's office to evaluate the current compliance with and the need for Rule 2013.

Exploration of Whether the Bankruptcy Rules Should be Restyled

Over the past two decades, each set of federal rules other than the Federal Rules of Bankruptcy Procedure have been comprehensively restyled. In the past, concerns have been raised that restyling of the Bankruptcy Rules should not be undertaken because of their close association with statutory text. For example, the Bankruptcy Rules continue to use the now disfavored word "shall" in order to be consistent with the Bankruptcy Code's use of that term. Nevertheless, incremental restyling has occurred, and in the process of revising Part VIII of the bankruptcy rules, which address bankruptcy appeals, and other individual rules, the new style conventions from other rule sets generally have been incorporated.

In response to suggestions from the style consultants that the time has come to comprehensively restyle the Bankruptcy Rules, the advisory committee has established a subcommittee to explore the advisability of such a project. The subcommittee anticipates that it will make at least a preliminary report to the advisory committee at its spring 2018 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The advisory committee met on November 7, 2017. Discussion focused primarily on its ongoing consideration of possible amendments to Rule 30(b)(6), a suggestion from the Administrative Conference of the United States regarding social security review cases,

suggestions urging rules for multidistrict litigation (MDL) proceedings, and a suggestion that Rule 26 be amended to require disclosure of third party litigation financing agreements.

Rule 30(b)(6) (Depositions of an Organization)

The advisory committee continued its consideration of Rule 30(b)(6), the rule addressing deposition notices or subpoenas directed to an organization. As previously reported, in May 2016, the Rule 30(b)(6) subcommittee solicited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision for objections to Rule 30(b)(6) deposition notices; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

The advisory committee posted an invitation for comment on the federal judiciary's rulemaking website and asked for submission of any comments by August 1, 2017. In addition, members of the subcommittee participated in two conferences focused on the rule in an effort to receive additional input from the bar.

The input received revealed significant disagreements as to what are the most serious problems with the rule. One set of concerns focused on perceived over-reaching in use of the rule, sometimes leading to overbroad or overly numerous topics for interrogation, or strategic use of the judicial admission possibility. A competing set of concerns focused on organizations'

preparation of their witnesses; some say organizations too often evade their responsibilities and that enforcement of the duty to prepare is too lax.

Positive comments were also received. It was reported that very often, after notice of a Rule 30(b)(6) deposition is given, the parties engage in constructive exchanges that produce improvements from the perspective of both the noticing party and the organization and that facilitate an orderly inquiry. Based on input from the bar on the six amendment ideas, the subcommittee determined that proceeding with any of them would likely produce controversy rather than improve practice. At the same time, it seemed that a rule amendment that prompts, or even requires, parties to communicate about recurrent problem areas might be the best approach for improving practice. Initially, the subcommittee focused on possible amendments to Rule 16(c) (to require the court to consider including provision for Rule 30(b)(6) depositions in a case management order) or Rule 26(f) (to direct the parties to discuss the matter during their discovery planning conference). Ultimately, however, the subcommittee returned to Rule 30(b)(6) itself, drafting language that adds the requirement that the parties communicate about Rule 30(b)(6) depositions when a party proposes to take such a deposition.

At the fall 2017 meeting, the advisory committee discussed the draft language. Members provided helpful feedback, including the following: (1) any amendment should make clear that there is a bilateral obligation to confer; (2) the organization should be expected to discuss the identity of the person to be offered as its designee as well as the matters for examination; and (3) the inclusion in the draft that the parties "attempt" to confer might be problematic. There was also discussion about whether an amendment to Rule 26(f) would in fact be helpful.

Since the meeting, the subcommittee has continued to work on a draft proposed amendment. It plans to present a proposed amendment for publication to the advisory committee at its meeting in April 2018.

Social Security Disability Review Cases

As previously reported, the advisory committee has added to its agenda the consideration of a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." The suggestion was referred to the advisory committee, as it is the appropriate committee to study and to advise about rules for civil actions in the district courts.

A subcommittee was formed to consider the ACUS suggestion and to gather additional data and information from the various stakeholders. As a first step, government and claimant representatives were invited to a meeting on November 6, 2017. Participants included the Vice Chair/Executive Director of the ACUS; the General Counsel of the Social Security Administration; the Counsel to the Associate Attorney General, Department of Justice; the Deputy Director of Government Affairs of the National Organization of Social Security Claimants' Representatives; and a representative of the American Association for Justice. The meeting began with formal statements and developed through open give-and-take discussion that substantially focused, and seemed to narrow, the issues.

At its meeting the next day, the advisory committee engaged in a lengthy discussion of the ACUS suggestion. A similarly robust discussion occurred at the January 2018 meeting of the Standing Committee. No final decision has been made regarding the ACUS suggestion; questions and concerns remain regarding the advisability of promulgating rules for specific types of cases and whether any such rules would be effective. However, the advisory committee through its subcommittee is committed to thoroughly considering the suggestion and anticipates several additional months of information gathering before deciding whether to pursue draft rules.

MDL Proceedings

At its fall 2017 meeting, the advisory committee formed a subcommittee to consider three proposals for specific rules for MDL proceedings – actions transferred for "coordinated or consolidated pretrial proceedings" under 28 U.S.C. § 1407. Two of the proposals suggested amendments to the Civil Rules to add provisions applicable to all MDL proceedings. Several of these proposed amendments are born of a common concern: large MDL proceedings often attract claimants whose purported claims have no foundation in fact, and there is no effective means for screening them out early. Other proposed amendments address bellwether trial practice and an expansion of the opportunities for interlocutory appellate review.

A third proposal would only apply to those MDL proceedings (about 20) involving more than 900 individual cases. It proposes that after discovery has been completed and the bellwether cases selected, the remaining work would be divided among five judges "to decide whether to dispose of a case on motion, settle, or remand." Judges from other districts could have intercircuit assignments to sit with the MDL court for these purposes.

The advisory committee engaged in a preliminary discussion of these suggestions at its fall 2017 meeting. It was the consensus of the advisory committee that more information is needed, especially input from the plaintiffs' bar and experienced MDL judges, as all of the proposals submitted thus far are from representatives of the defense bar. The subcommittee has begun information gathering. In considering whether there is an opportunity to improve MDL practice by amending current rules or adopting new rules, the subcommittee will coordinate closely with the Judicial Panel on Multidistrict Litigation.

Third Party Litigation Financing Agreements

The advisory committee has received a suggestion to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The advisory committee considered and declined to act upon similar proposals in 2014 and again in 2016. At its fall 2017 meeting, the advisory committee recognized that the issue is complicated and that any consideration must include input from both proponents and opponents of disclosure. The committee referred the issue to the MDL subcommittee, since one of the MDL proposals discussed above explicitly calls for disclosure of third party financing agreements. Additionally, such funding agreements are often used in MDL proceedings. The subcommittee will study the issue in an effort to determine whether it is something that should be pursued.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The advisory committee met on October 24, 2017. Among the topics for discussion were the consideration of the final report of the cooperator's subcommittee, a suggestion to amend Rule 32, and the development of a manual on complex criminal litigation.

Cooperator's Subcommittee

The main topic of discussion at the fall 2017 meeting was a report from the cooperator's subcommittee which was tasked with developing amendments to the Criminal Rules to address concerns regarding dangers to cooperating witnesses posed by access to information about cooperation in case files. The rules committees were asked to develop possible rule amendments

to implement the recommendations of the Judicial Conference Committee on Court Administration and Case Management (CACM) in its guidance issued in June 2016.

The subcommittee presented its final report detailing its comprehensive study of the issue, its development of several packages of rules proposals, and its recommendations to the full advisory committee. The report included the development of rules amendments to implement the CACM guidance, as well as four alternative approaches and related rules amendments: (1) amendments omitting the requirement in the guidance for bench conferences in every case during the plea and sentencing hearings; (2) amendments omitting the bench conferences and sealing the entirety of various documents that may refer to cooperation, rather than requiring bifurcation and the filing of sealed supplements to each document; (3) amendments omitting the bench conferences and directing that cooperation-related documents be submitted directly to the court and not filed, rather than filed under seal; and (4) amendments designed to implement the CACM guidance and to supplement it with additional rules amendments that might be deemed necessary or desirable to carry out the CACM Committee's approach and objectives. The subcommittee also reported that it had begun, but not completed, consideration of a new draft Criminal Rule 49.2 that would limit remote access to categories of documents that frequently refer to cooperation, but would allow full access to those documents at the courthouse.

The subcommittee reported that in its view the package of rules amendments developed to implement the CACM guidance would fully do so. However, the subcommittee reported that it did not recommend adoption of that rules package or any of the other alternative sets of rules amendments it developed.

After robust discussion, the advisory committee agreed with the subcommittee's recommendation that no rules amendments on this issue be pursued at this time. All members agreed that the threat of harm to cooperators is a serious problem that should be addressed, but

the advisory committee determined that rules amendments were not the best way to address the problem at this time. Various concerns were expressed, including the notion that the proposed amendments would make judicial proceedings less transparent, and that the amendments would result in sweeping changes that may not be necessary. Members were also of the view that other changes (*e.g.*, possible recommendations by the Task Force on Protecting Cooperators that changes be made by the Bureau of Prisons and to the CM/ECF system) should be implemented before embarking on rules amendments.

The advisory committee also decided to hold in abeyance any final recommendation on the subcommittee's alternative approach of limiting remote public access, reflected in its working draft of new Rule 49.2, but provided feedback to the subcommittee on its working draft.

Rule 32(e)(2) (Sentencing and Judgment–Disclosing the Report and Recommendation)

Also at the fall 2017 meeting, the advisory committee decided to add to its agenda a suggestion to amend Rule 32(e)(2) which states: "The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period." Probation officers often receive requests from defendants for copies of their presentence reports (PSRs). There is concern that this provision might contribute to the problem of threats and harm to cooperators. These requests may be the result of pressure from other inmates to provide materials that could reveal whether there was cooperation. Rule 32(e)(2) deliberately grants the right to receive the PSR to the defendant in order to increase the chances that incorrect information would be identified and corrected. At present, however, PSRs are often served only on counsel, not on the defendant. Given this reality and the concern that providing PSRs directly to defendants might contribute to the problem of threats and harm to cooperators, the question of whether to amend Rule 32(e)(2) was referred to the cooperator's subcommittee for consideration.

Manual on Complex Criminal Litigation

The Rule 16.1 subcommittee has been charged with exploring the possibility of developing a manual on complex criminal litigation that would parallel the Manual on Complex Civil Litigation. With input from the subcommittee, the FJC has agreed to develop a special topics page on its website focused exclusively on complex criminal litigation. The page will initially include existing relevant materials. No decision has been made yet whether all of the materials originally prepared for judicial use will be available to the public. Going forward, the FJC will spearhead the development of a manual, including obtaining input on topics from a broader group.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 26, 2017. In conjunction with this meeting, the advisory committee convened a group of experts to discuss topics related to forensic expert testimony, Rule 702, and *Daubert*.

Conference on Forensic Expert Testimony, Rule 702, and *Daubert*

The conference consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether Evidence Rules amendments could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel consisted of judges and practitioners, and discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The conference provided much material for the advisory committee to evaluate.

Possible Amendment to Rule 801(d)(1)(A)

Rule 801(d)(1)(A) currently provides that prior inconsistent statements of a testifying witness, made under oath at a formal proceeding, may be admitted for substantive purposes. The

advisory committee continued its consideration of an amendment that would expand the rule to allow for substantive admissibility of prior inconsistent statements that are audiovisually recorded. At the advisory committee's request, the FJC prepared and issued surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. In addition, at the invitation of the advisory committee, several comments were submitted. At its next meeting, the advisory committee will consider this input, and decide whether or not to proceed with an amendment to Rule 801(d)(1)(A).

Possible Amendments to Rule 404(b)

The advisory committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. The advisory committee has resolved not to propose an amendment that would add an "active contest" requirement to Rule 404(b), concluding that such a requirement would be too rigid and should be left to the court's assessment of probative value and prejudicial effect. The advisory committee will continue to consider other possible amendments to Rule 404(b).

Possible Amendment to Rule 106

The advisory committee is considering whether Rule 106, the rule of completeness, should be amended to provide that a completing statement is admissible over a hearsay objection, and to provide that the rule – which currently is limited to written or recorded statements – should be expanded to cover oral statements as well.

Possible Amendment to Rule 609(a)(1)

The advisory committee is considering a suggestion to abrogate Rule 609(a)(1), which provides for admissibility (subject to a balancing test) of a witness's prior criminal convictions that did not involve dishonesty or a false statement. The reason for the suggestion is a reliance on principles of "restorative justice," i.e., that a person who has been convicted and released into

society should not be saddled with the opprobrium of a prior conviction, and that non-falsity convictions as a class are of very limited probative value and are highly prejudicial. The suggestion was considered with the knowledge that Rule 609(a)(1) and its applicable balancing tests are the result of a compromise following extensive congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The advisory committee will continue its consideration of Rule 609 at its spring meeting.

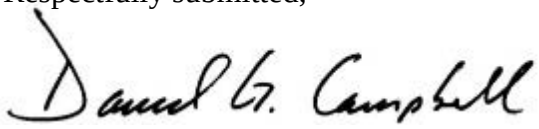
Rule 606(b) and the Supreme Court's Decision in *Pena-Rodriguez v. Colorado*

The advisory committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. In that case, the Court held that application of Rule 606(b), which bars testimony of jurors regarding deliberations, violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. The advisory committee previously declined to pursue an amendment due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. At its spring 2018 meeting, the advisory committee will revisit the issue of a possible amendment, but notes that continued review of the case law indicates that the lower courts are adhering to (and not expanding) the *Pena-Rodriguez* holding. The goal of any amendment would be to assure that Rule 606(b) would not be subject to unconstitutional application.

JUDICIARY STRATEGIC PLANNING

The Standing Committee considered the request to comment on two questions related to the *Strategic Plan for the Federal Judiciary*, and has provided a response to Chief Judge Carl Stewart, the judiciary's planning coordinator.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

TAB C.3

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Pending Legislation That Would Directly Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	**H.R. 985** *Sponsor:* Goodlatte (R-VA) *Co-Sponsors:* Sessions (R-TX) Grothman (R-WI)	CV 23	**Bill Text (as amended and passed by the House, 3/9/17):** https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf **Summary (authored by CRS):** (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless: · in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; · no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and · in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief. No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members. Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons. A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.	· 3/13/17: Received in the Senate and referred to Judiciary Committee · 3/9/17: Passed House (220–201) · 3/7/17: Letter submitted by AO Director (sent to House Leadership) · 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) · 2/15/17: Mark-up Session held (reported out of Committee 19–12) · 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 2/9/17: Introduced in the House

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice. Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action. Appeals courts must permit appeals from an order granting or denying class certification. (Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs. A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements. (Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried. **Report:** https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf	

Pending Legislation That Would Directly Amend the Federal Rules
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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	**H.R. 720** *Sponsor:* Smith (R-TX) *Co-Sponsors:* Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	**Bill Text (as passed by the House without amendment, 3/10/17):** https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf **Summary (authored by CRS):** (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf	· 3/13/17: Received in the Senate and referred to Judiciary Committee · 3/10/17: Passed House (230–188) · 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 1/30/17: Introduced in the House
	S. 237 *Sponsor:* Grassley (R-IA) *Co-Sponsor:* Rubio (R-FL)	CV 11	**Bill Text:** https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf **Summary (authored by CRS):** This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.	· 11/8/17: Senate Judiciary Committee Hearing held – "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators" · 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** None.	
Stopping Mass Hacking Act	**S. 406** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf **Summary:** (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016." **Report:** None.	· 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 1110 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf (Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016. (b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant." **Summary (authored by CRS):** This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances. **Report:** None.	· 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations · 2/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Back the Blue Act of 2017	**S. 1134** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	· 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 2437 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	· 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations · 5/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Report: None.	

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 16.1

DATE: March 18, 2018

This memorandum summarizes the Rule 16.1 Subcommittee's recommendations concerning issues raised during the public comment period. All of the comments were supportive of (or did not question) the amendment's general approach: requiring the prosecution and defense to confer about discovery soon after arraignment. However, several of the comments expressed concerns and/or suggested changes in the text or Committee Note.

The following issues were raised in the comments:

(1) Should the text or note state that the amendment does not preclude shorter times for discovery required by local court rules or court orders?
(2) Should the text or note be amended to state that the amendment does not grant new discovery authority or override current statutory limitations (e.g., CIPA and the Jencks Act)?
(3) Should the rule explicitly state that it does not apply to pro se defendants?
(4) Should the amendment be relocated or renumbered?
(5) Should the rule require the parties to confer "in good faith"?
(6) Should the rule require the parties to file a joint discovery report?

The Subcommittee concluded that the existing note was sufficient to address the concern about local rules and orders setting shorter times for discovery, but it agreed to propose revisions to address statutory limitations such as CIPA and the applicability of the rule to pro se defendants. It recommends against the other suggested changes. We discuss the Subcommittee's recommendations concerning these issues briefly below. Finally, we note a few minor changes recommended by the style consultants.

1. Local rules or court orders setting shorter time limits.

Two comments expressed concern about the effect of the proposed rule in districts where local rules already require the government to make specific disclosures at particular times, especially where those disclosures must be made before the time set for the pretrial discovery conference (14 days after arraignment).

The Federal Magistrate Judges Association (FMJA)'s comment (2017-CR-0009) stated that some members preside in districts with local criminal rules requiring the government to make specific disclosures at particular times; in at least one district some disclosures must be made earlier than 14 days after arraignment. These local rules are an aspect of case management

that helps to ensure compliance with the Speedy Trial Act. Accordingly, the FMJA suggested an addition to the Committee Note stating "in words or substance, that nothing in the amended rule is intended to delay times for producing discovery set forth in a local rule, or a Court order in a particular case, particularly when a local rule or Court order requires more prompt disclosure than the amended rule contemplates."

The comment of Ellie Birtwell (Aderant CompuLaw) (CR-2017-0011) expressed a similar concern, noting one district requires the parties to meet and confer within 7 days of arraignment, and two other districts require discovery to be provided within 14 days of arraignment. Although the new deadline in Rule 16.1 is not intended to displace local rules, she noted that in the latter districts the local rules would require discovery to be provided on same day as the deadline for conferring. Assuming that the amendment is intended to allow local courts to continue to set different guidelines, Birtwell recommended that the text be amended to make this point clear. She proposes the following introductory clause:

> Unless otherwise provided by local rule or court order, no later than 14 days after the arraignment the attorneys for the government and the defendant must confer, and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

In the drafting process the Subcommittee (and later the full committee) sought to preserve the authority of district courts to impose additional discovery requirements by local rule or court order. As published, the Committee Note states (emphasis added):

> The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

The Subcommittee concluded that no further clarification is needed, in either the text or the Committee Note, to respond to the concerns raised by the FMJA and Ms. Birtwell. It recommends no change be made in this respect.

2. The district court's authority to "determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial."

The Department of Justice (CR-2017-0010) expressed concern that the language in (b) might be read to "grant[] new discovery authorities that could cause serious problems and undermine important protections contained in other laws." As published, (b) provides (emphasis

added):

> (b) Modification of Discovery. After the discovery conference, one or both parties may ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.

The Department noted that this language varies slightly from current Rule 16(d)(2)(A), which states that a court may "specify its time, place, and manner; and prescribe other just terms and conditions. . . ." It suggested that under the canons of construction courts would avoid an interpretation that would render the new language surplusage, and hence would read Rule 16.1(b) as conferring more expansive authority than Rule 16. The Department expressed particular concern that the new language might be read to override specific statutory limitations on discovery, such as the CIPA and the Jencks Acts. To avoid these unintended results, the Department proposed the elimination of (b), and perhaps merging the remaining language of the proposed amendment into Rule 16. Alternatively, it proposed the following change in the text:

> After the discovery conference, one or both parties may ask the court to determine or modify the ~~timing, manner, or other aspect of disclosure~~ time, place, or manner, or other terms and conditions of disclosure, in accordance with Rule 16 and other applicable law, to facilitate preparation for trial.

The Department also suggested additional language for the Committee Note:

> . . . nothing in this new rule is designed to change substantive discovery rules, grant the courts authorities in addition to what is provided for under Rule 16 and other applicable law, or change the safeguards provided in various security and privacy laws such as the Jencks Act or the Classified Information Procedures Act ("CIPA").

The National Association of Criminal Defense Lawyers (NACDL) (CR-2017-0012) opposed the changes proposed by the Department, praising the flexibility of the rule as published and stating its understanding that the rule "rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case." NACDL also urged that "[t]he Committee should ensure that its explanatory Note makes the judge's discretion and authority to manage discovery in each case in the interest of fairness and trial management unambiguously clear."

The Subcommittee agreed to recommend that the language be conformed to the phrasing of Rule 16(1)(b). There is no substantive difference between the phrasing used in the rule as published ("the timing, manner, or other aspect of disclosure") and the parallel words in Rule 16 ("time, place, or manner, or other terms and conditions of disclosure"). Although it seems

unlikely that these slight differences would form the basis for a successful argument that Rule 16.1 was intended to be different in some important respect, the Subcommittee saw no objection to having Rule 16.1(b) track the phrasing of Rule 16(d)(2)(A). The style consultants had no objection to the proposed change.

The Subcommittee did not, however, accept the suggestion that the text be altered to add references to Rule 16 "and other applicable law." Adding a requirement that the court must act "in accordance with . . . other applicable law" to this rule might suggest that unless the same language is added to other rules the courts have carte blanche to ignore other relevant laws. The style consultants were unanimous in rejecting this language. Moreover, as Professor McConkie's article documents, the local rules in many districts currently contain many requirements not present in Rule 16 (and some that may arguably be inconsistent with Rule 16). Similarly, there are many standing orders that impose requirements not present in Rule 16. Indeed, as noted above, two commentators expressed concern about overriding such local rules on discovery timing. The Committee Note's statement that the rule does not displace local rules was intended to leave local rules unchanged, and to allow the continued development of the law by both local rules and orders regulating individual cases or practice before individual judges.

The Subcommittee agreed, however, that it would be appropriate to add language to the Committee Note addressing the Department's concern by recognizing the limited nature of the new rule. The placement of the new language shows that the new rule alters neither the statutory safeguards for security and privacy, nor the local rules or standing orders:

> The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

The Subcommittee unanimously recommends the addition of this language.

3. Pro se parties.

Two comments addressed the application of the amendment to pro se parties. The Department of Justice suggested that the Committee Note squarely address the point, implicit in the text, that the requirement of a pretrial conference is applicable only to attorneys and hence not to pro se defendants. NACDL disagreed, suggesting that "'attorney for the defendant' is properly understood to include defendants representing themselves." Further, NACDL argued, the Committee Note should confirm this understanding. It observed that in special circumstances that would make

conferring with a pro se defendant impractical, the government can seek relief on a case-by-case basis.

These comments squarely presented the question whether the prosecution should have a duty to confer with a pro se defendant concerning discovery within 14 days after arraignment, assuming that it would be feasible to do so (and hence no case-by-case exception would be warranted). On the one hand, most pro se defendants lack the training and experience to understand the discovery process, and conferring in such circumstances would often be difficult. On the other hand, cases involving pro se defendants may include quantities of ESI, and such defendants – even more than those represented by counsel – have a very significant interest in the timing and form of discovery.

The Subcommittee concluded that for a variety of practical reasons it is not appropriate to require the government to confer about discovery with each pro se defendant within 14 days of arraignment. The Subcommittee also agreed that this limitation had been implicit in the text of the rule as published, and that the text should make this point clear. As revised by the style consultants, proposed subsection (a) requires "the attorney for the government and the defendant's attorney" to confer and try to agree on the timetable and procedures for pretrial disclosures. After substantial discussion, the Subcommittee also agreed to propose this addition to the Committee Note:

> For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

The addition has two principal purposes. First, it highlights the limitation in the text, and states that the rule limits the required discovery conferences only to cases where the defendant is represented by counsel "for practical reasons." Second, it recognizes the courts' discretion to manage discovery and their responsibility to ensure pro se defendants "have full access to discovery." Although the Subcommittee agreed that it is not practical to require discovery conferences with pro se defendants, it also recognized that it is essential for such defendants to have pretrial access to material necessary to prepare their defense. Because the published rule did not address pro se defendants, the Subcommittee thought it best to include only a general statement about the courts' existing discretion to manage discovery and ensure access for pro se defendants.

4. Relocating or renumbering the amendment.

Two comments address the location of the new provision. As noted above, the Justice Department suggested that it might be desirable to delete subsection (b) and move the new provision imposing a duty to confer to Rule 16. It suggested, for example, that it could be added to existing Rule 16(d) as a new subsection:

(d) Regulating Discovery.

(1) Pretrial Discovery Conference. No later than 14 days after the arraignment the attorneys for the government and the defendant must confer, and try to agree on a timetable and procedures for pretrial disclosure under this rule.

(~~1~~2) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(~~2~~3) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

A Concerned Citizen suggested (CR-2017-005), instead, that the new rule come after Rule 10 (arraignment) and before Rule 16 (discovery). This would, Concerned Citizen urged, preserve the present order of the rules, which follows the chronology of the typical criminal case. Citizen favors placing the new rule between Rules 11 and 12.

The Subcommittee recommends that no change be made in the numbering or location of the rule. The Subcommittee initially considered whether to propose a change to Rule 16, or to propose a new freestanding Rule, and it favored a freestanding rule. A new rule will be much more visible than placement within Rule 16, which is already very long and complex. A simple freestanding rule also parallels Rule 17. These considerations are still persuasive, and the Subcommittee saw no reason to relocate the new rule.

5. Good faith.

This issue was raised by one commentator, Professor Daniel McConkie (CR-2017-0007), who attended the October meeting, making a brief presentation and responding to questions in lieu of providing formal testimony. (This portion of the meeting is described on pp. 30-31 of the draft minutes). In brief, Professor McConkie has argued that Rule 16.1, like the Civil Rules, should expressly impose the requirement of conferring in "good faith." He noted that there are situations in which one party is not engaged and the other party "needs the ability to file a motion

with some teeth to call out that bad behavior." In response to a member's question at the October meeting, Professor McConkie stated that he knew of no empirical research that might show whether the inclusion of that phrase has had an effect in any districts.

In the drafting process the Subcommittee considered including a good faith requirement, but it declined to do so. The Subcommittee was not persuaded to reverse this decision.

6. Joint discovery report.

In a recent law review article (submitted as part of his comments on Rule 16.1), Professor McConkie described local rules that require both discovery conferences and pretrial joint discovery reports. In one district, this report includes a disclosure agreement checklist. Some rules limit the requirement of a report to cases designated as "complex." Professor McConkie urged the Committee to add similar provisions to Rule 16.1.

Although the Subcommittee did not specifically consider the requirement of a joint defense report, in the drafting process it did consider – and decide against – special rules for "complex" cases and, more generally, against more detailed requirements beyond conferring within 14 days after arraignment. The Subcommittee was not persuaded that it would be desirable to add such a requirement.

7. Other style changes.

Judge Kethledge and the reporters accepted several changes recommended by the style consultants, which they concluded did not affect the substance of the proposed rule.

- The consultants recommended changes in the captions to more accurately reflect the subject of subsection (b). The revised caption is "Request for Court Action."

- The consultants recommended the text in subsection (a) refer, for clarity, to "the attorney for the government and the defendant's attorney" rather than the "attorney for the government and for the defendant."

- Finally, the consultants recommended the deletion of a comma that was not needed.

PUBLIC COMMENTS
RULE 16.1

CR-2017-0005. A Concerned Citizen. Because Rules 3 through 38 are generally "organized chronologically based on how a federal prosecution typically unfolds," Citizen suggests placing the new rule between Rules 11 ("Pleas") and Rule 12 ("Pleadings and Pretrial Motions)."

CR-2017-0007. Daniel McConkie. Prof. McConkie supports the rule but recommends two changes: (1) the parties should be required to confer in good faith, and (2) the parties should, following their discovery conference, file a joint discovery report with the court.

CR-2017-0009. Federal Magistrate Judges Association (Linda R. Anderson). FMJA "support[s] the concept of directing counsel in criminal cases to confer on these matters." But FMJA "suggest[s] that the Committee Note include a sentence or paragraph saying, in words or substance, that nothing in the amended rule is intended to delay times for producing discovery set forth in a local rule, or a Court order in a particular case, particularly when a local rule or Court order requires more prompt disclosure than the amended rule contemplates."

CR-2017-0010. U.S. Department of Justice, Criminal Division (John P. Cronan, Acting Assistant Attorney General). DOJ "fully support[s] the rule's primary requirement that prosecutors and defense lawyers in federal criminal cases confer about discovery soon after arraignment." However, DOJ expresses two concerns: (1) the Rule will "be read by some . . . to provide *new* authorities to district courts to expand or contract discovery obligations or change discovery procedures . . . otherwise governed by existing law" (such as CIPA and the Jencks Act), and (2) it is not clear "how this rule will apply in cases where defendants exercise their constitutional right to represent themselves." DOJ advocates clarification in the text or Committee Note to address these concerns.

CR-2017-00011. Aderant CompuLaw (Ellie Bertwell). To make it clear that the proposed rule allows the District Courts to set a different deadline for the discovery conference, Aderant Compulaw recommends adding the prefatory phrase "'Unless otherwise provided by local rule or court order.'"

CR-2017-0012. National Association of Criminal Defense Lawyers (Peter Goldberger et al.). NACDL praises the flexibility of the proposed rule, which requires the parties to address discovery issues "early and with resort to the court's assistance." NACDL opposes any attempt to limit the rule, which "rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case." It urges that the Committee Note should "make[] the judge's discretion and authority to manage discovery in each case in the interest of fairness and trial management unambiguously clear." NACDL also opposes a "blanket exception" for *pro se* defendants.

TAB 2B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16.1. Pretrial Discovery Conference; Request for Court Action

(a) Discovery Conference. No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(b) Request for Court Action. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer shortly after arraignment about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically stored information (ESI) or other voluminous or complex discovery.

For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" (2012).

Subsection (b) allows one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

Changes After Publication

There were no substantive changes. The captions were revised to more accurately reflect the subject of subsection (b), which is a "Request for Court Action." The phrase "timing, manner, or other aspects" was revised to "time, place, manner, or other aspects" to track Rule 16(d)(2)(A). Two changes were made in response to concerns about possible ambiguity in the text as published. First, subsection (a) was revised to require a conference between "the attorney for the government and the defendant's attorney," and the Committee Note was revised to state that for practical reasons the Rule does not require a discovery conference with a pro se defendant. Second, the Note was modified to include a statement that the Rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act.

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Proposed Amendments to Rule 5 of the 2254 and 2255 Rules**

DATE: **March 26, 2018**

The Rule 5 Subcommittee met by telephone in March to discuss the public comments received on the following proposed amendment to Rule 5 of the 2255 Rules, and a parallel amendment to Rule 5 of the 2254 Rules.

Three comments were received during the comment period.

Two of the comments addressed issues that had been considered before publication. Joseph Goodwin saw no need for the amendment, because "The District Court has discretion to deal with any scheduling issues." Patrick Kite objected to retaining the word "may." He noted, "Rule 5(d) . . . has left a lot of confusion as to what the word 'MAY' implies. To clearly and completely address this as the right of the moving party, 'may' should be replaced by 'has a right to' or 'is entitled to.'" Responding to the style consultants' concern that such a change would cast doubt on the meaning of "may" elsewhere in the rules, Mr. Kite concluded that "casting doubt on the meaning of 'may'" is inconsequential when it is already misunderstood." Because these issues had been debated at length before publication, the Subcommittee decided there was insufficient reason to revisit them.

The third comment, from NACDL, expressed support for the proposed amendments to Rule 5 of both the 2254 and 2255 Rules, but suggested a related change. NACDL argued that inmates should be told about the reply and when it should be filed at the time the court orders the respondent to file a response; it proposed an additional amendment to Rule 4 of the 2254 and 2255 Rules:

> If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order, *and must specify the time during which the petitioner may file a reply under Rule 5(e).*

After discussing this issue at length, the Subcommittee decided to recommend that NACDL's proposal not be pursued, but that a sentence be added to the Committee Notes accompanying the Rule 5 amendments. Subcommittee members mentioned several reasons for favoring this approach. Several members expressed the view that the published amendment would generally result in the desired notice, which would ordinarily come in the court's order stating the time for any reply to the government's answer. In their view, the proposed amendment to Rule 4 was not needed. Additionally, the reporters advised that an amendment changing Rule 4 or adding text on this separate issue to Rule 5 would require publication. The Subcommittee was reluctant to delay the progress of the Rule 5 amendments that have already been published in order to take on this proposed change.

Instead, the Subcommittee recommends adding the following language to the end of the Committee Note for Rule 5 of the 2254 Rules and Rule 5 of the 2255 Rules:

> Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

This addition would serve as a helpful reinforcement of best practices. It would not require republication.

The proposed amendments, including the recommended addition to the Committee Notes, are included at Tab B.

PUBLIC COMMENTS
RULES 5 OF THE RULES GOVERNING 2254 AND 2255 PROCEEDINGS

CR-2017-0003. Joseph Goodwin. Goodwin "do[es] not see the need for this amendment" because "[t]he District Court has discretion to deal with any scheduling issues."

CR-2017-0004. Patrick Kite. Kite states "'may' should be replaced by 'has a right to' or 'is entitled to,'" because "'[c]asting doubt on the meaning of 'may' is inconsequential when it is already misunderstood."

CR-2017-0012. National Association of Criminal Defense Lawyers (Peter Goldberger et al.) NACDL expresses support for "the proposal to clarify that a habeas petitioner or § 2255 movant has an unambiguous right to file a reply to the respondents' or government's Response." However, because the proposed rules "do not advise the court when or how it is that the petitioner/movant should be advised of the right to reply and the time during which s/he may do so," NACDL "suggests that the time and place for such notice is in the court's Order under Rule 4 directing the filing of an Answer or Response."

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RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS[1]

Rule 5. The Answer and the Reply

* * * * *

(e) Reply. The petitioner may ~~submit~~file a reply to the respondent's answer or other pleading~~ within a time fixed by the judge~~. The judge must set the time to file unless the time is already set by local rule.

Committee Note

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the petitioner to file a reply in a case under § 2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the petitioner has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

[1] New material is underlined in red; matter to be omitted is lined through.

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RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS[1]

Rule 5. The Answer and the Reply

* * * * *

(d) Reply. The moving party may ~~submit~~file a reply to the respondent's answer or other pleading~~ within a time fixed by the judge~~. The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under § 2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 32(e)(2)

DATE: March 19, 2018

At the October meeting, Judge Molloy requested that the Cooperator Subcommittee consider whether to recommend any change to Rule 32(e)(2)'s requirement that before sentencing the probation officer must give the presentence report (PSR) "to the defendant" (as well as to the defendant's attorney and an attorney for the government). The concern was that defendants might be pressured by others to obtain or disclose their PSRs in order to determine whether they had cooperated.

The Subcommittee held a conference call to consider two memoranda prepared by the reporters, which summarized the legislative history of the rule and identified issues for consideration.

This memorandum describes briefly the Subcommittee's discussion, its close vote not to recommend an amendment, and information received after the call. The memoranda considered by the Subcommittee are provided at Tab B.

The Subcommittee Call

Members expressed a variety of views.

Some members saw no reason for an amendment at this time. They emphasized several points. First, the Bureau of Prisons is taking steps to address the problem of pressure within its facilities for inmates to "show their papers." Second, in many cases the lawyers – rather than individual defendants – are now being served with the PSRs (as they are with other filings under Rule 49). Third, as a practical matter, it may be necessary for defendants who are in custody before they are sentenced to receive and review their PSRs before they meet with defense counsel. A member emphasized that it is important for a defendant to have a substantial period of time to review the PSR, and to linger over it, given its importance. This is why the rule requires that the defendant himself receive a copy. Members understood that the Bureau of Prisons allows defendants to possess their PSRs before sentencing, and did not think that would be affected by the changes being proposed by the Task Force. A member noted that many defendants are held in state or local facilities before trial. We lack the ability to regulate these facilities, which operate under contract with the U.S. Marshals Service. And in all states except Florida the client files belong to the client, not the attorney. Some members expressed the view that defense counsel is ethically bound to provide anything in the file, including the PSR, to the client if the client asks for it.

Other members thought an amendment could reduce (though not eliminate) risk to defendants from individuals seeking to learn whether they had cooperated. If pressured to show his PSR, an amendment would allow a defendant to say that he could not get it. Another member agreed it would be desirable to reduce risks. In that member's view, the preferred procedure is for the PSR to be served on defense counsel, and for the defendant to have ample time to review the PSR with counsel. Another member agreed, noting this procedure is followed in the member's district. A member also expressed the view that Rule 49's general instruction for service on counsel for a represented defendant do not override the specific requirement in Rule 32(e)(2) that the PSR be given to the defendant and the defendant's attorney. Rule 49 does not solve the problem.

On a close vote, the Subcommittee decided not to recommend an amendment.

Information Received After the Call

After the call, the reporters confirmed that – at least until secure options for adequate review of PSRs are available in state and federal facilities in which defendants are held before sentencing – the current Task Force recommendations do not include changes in the Bureau of Prisons' current procedures, which permit defendants to possess their own PSRs before sentencing.

The reporters also received information regarding the current practice of probation officers nationwide. Carrie Kent, PPSO Criminal Law Policy Staff, Administrative Office of U.S. Courts, reported:

> We reached back out to the probation chiefs and received responses from roughly half of the districts (51). As expected, practices vary among the districts, and sometimes within a single district depending on preferences of the individual judges on the bench. In half of the responses received, districts reported disclosing the report through CM-ECF and relying on defense counsel to share the report with defendants. Those districts no longer disclose reports directly to defendants, although many noted exceptions to this practice, such as when a defendant is representing himself.
>
> The other districts reported a variety of practices, e.g., using a waiver form for the defendant to sign if detained to avoid the report ending up at a correctional facility, or a mixed approach – they provide the reports directly to defendants on bond but not to those detained, etc.

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From: [redacted]
Sent: Friday, May 12, 2017 3:37 PM
To: [redacted]
Cc: [redacted]
Subject: Rule 32(e)(2)

Sara and Nancy,
Recently an issue came up that might impact either a rule amendment in light of the CACM cooperator issue, or an issue to consider at our next meeting. [redacted] A defendant in Billings has raised an objection under Rule 32(e)(2) that he was not personally given a copy of the PSR. You can surmise why he wants the report, either because the rule requires that or because someone wants him to produce his "papers". Without consideration of harmless error this is what the rule says:

"The probation officer **must** give the presentence report ***to the defendant***, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this ***minimum period***."

It doesn't seem like there is much wiggle room in the language of the rule. In our district, up to this point, the rule has been honored in the breech. The rule if followed will obviously impact the presentence issue of the availability of "papers" in jails and perhaps create a problem with the solution suggested to have the PSR available only in the Warden's office or defined location. Waiver seems to address the 35 day rule as opposed to what three people get the PSR.

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MEMO TO: **Cooperators Subcommittee**

FROM: **Professors Sara Beale and Nancy King, Reporters**

RE **Rule 32(e)(2)**

DATE: **February 20, 2018**

As noted in our reporters' memorandum to the Committee of September 23, 2017 (included as an attachment to our email), a concern has been raised that Rule 32(e)(2)'s requirement that a probation officer "give the presentence report to the defendant" (as well as the defendant's attorney) could exacerbate the problem of threats and harm to cooperators. If Rule 32's language is providing the basis for defendants to obtain access to their PSRs, amending Rule 32 to allow only for defendant's review—but not possession—of the PSR might alleviate this problem. If defendants have no right to receive or possess their PSRs, they can credibly assert they have no way to comply with requests by others to produce PSRs. The matter has been referred to the Cooperators Subcommittee, and this memorandum provides a preliminary list of issues for discussion at the Subcommittee's call on February 27.

We assume that the Subcommittee's charge is to address only the "new" concerns about threats to cooperators, and not to revisit other policy decisions made during the Rules process as Rule 32 has been amended over the years. Those decisions include the conclusion that the defendant himself (not just counsel) must have the opportunity to review the PSR before sentencing in order to ensure its accuracy.[1] Our earlier memorandum reviewed the history of Rule 32(e)(2), and we will not repeat that here.[2]

Below we outline three broad issues: (1) how effective an amendment to Rule 32 would be in limiting inmates' access to copies of their PSRs, (2) the potential costs of such an amendment, and (3) other alternatives that might advance the same goal.

A. Would restricting possession of the PSR to counsel under Rule 32 effectively limit defendant access to a copy of the PSR?

If the amendment to Rule 32 is intended to prevent possession of the PSR by the criminal defendant, its effectiveness in accomplishing this goal may be undercut if other avenues remain open for defendants to obtain or keep copies of their PSRs.

1. Copies of the PSR obtained before sentencing.

So long as defendants must review the PSR before sentencing, there will be some risk that individual defendants will retain or make a copy of that PSR, or allow another to do so.

[1] FED. R. CRIM. P. 32(c)(3) advisory committee note to 1983 amendment ("failure to disclose the report to the defendant or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel").

[2] We would like to acknowledge the assistance of Julie Wilson, who reviewed all of the available materials on the history of Rule 32 to ensure that there was no additional information relevant to the Subcommittee's assignment.

Before Rule 32 was amended in 1989, it required that any copies of the PSR provided to the defendant, counsel for the defendant, or the government be returned to the probation officer immediately after imposition of sentence. In those days before digital files, all copies were "paper" copies. Although it was possible for a defendant to make a copy of the PSR using a copy machine or a film camera, today making a copy is much easier. As a result, it is even easier to circumvent a rule barring continued possession of the PSR.

Many defendants may now easily produce copies of either digital or paper PSRs, then either give that copy to another for safekeeping or retain it for later use. If counsel provides a digital copy of the PSR for a defendant who is not incarcerated to review, the defendant or anyone he may ask for assistance can easily duplicate and store a copy. If counsel provides only a paper copy to the defendant for review before sentencing (which may be common when the defendant is incarcerated), the defendant may still be able to secure a digital copy using a contraband cell phone's camera, or a copy machine in the facility. Once saved, any copy becomes available for examination by the defendant or anyone else with access to that copy.

Because defendants must have an opportunity to review their PSRs before sentencing, an amendment to Rule 32(e)(2) would not fully address the concerns about cooperators unless there were also some mechanism to prevent (or significantly reduce) the defendant's opportunity to copy the PSR during the review process. One option would be to amend Rule 32 to impose a duty on defense counsel to ensure that her client does not make or keep a copy when reviewing the PSR. But this poses several concerns addressed below, in Part B.

Alternatively, for those defendants who are confined, a duty to supervise an inmate's review of his PSR could be imposed on correction facility staff to prevent surreptitious copying or exhibition to others. Under current policy, this is not required in BOP facilities. If counsel, the court, or the probation officer provides a copy of the PSR to an incarcerated defendant prior to sentencing, that defendant *may* possess that copy and there is no BOP rule requiring supervision during review of the PSR to prevent duplication or exhibition by either the inmate or any visitor to whom the inmate may show the PSR.[3] We understand that the Task Force on Protecting Cooperators is considering recommendations for BOP that would affect inmate access to paper copies of the PSR, including designation of secure areas where inmates can review but not retain PSRs, and installation of kiosks or other devices on which inmates could view electronic files in order to eliminate paper copies. These new policies, if and when implemented, may reduce the risk that the PSR may be copied while being reviewed by a defendant. Because Rule 32 governs sentencing procedure and not corrections policies, it would not be appropriate to add restrictions of this nature to Rule 32. Moreover, a BOP policy change would not affect state correctional oversight of federal defendants who are confined in state facilities when preparing for sentencing on a federal charge.

[3] The prohibition on the possession of PSRs "does not apply to inmates in Bureau of Prisons custody with a need to review their PSRs prior to sentencing. For example, a pretrial inmate scheduled for sentencing *may possess* and review the PSR in preparation for sentencing. *After* sentencing, however, the inmate is prohibited from retaining a copy of the PSR." DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, BOP PROGRAM STATEMENT 1351.05, CN-01, RELEASE OF INFORMATION 16–18 (2015), www.bop.gov/policy/progstat/1351_005_CN-1.pdf (emphasis added) [hereinafter BOP 1351.05].

2. Copies of the PSR obtained after sentencing

Even if Rule 32 could effectively bar a defendant from copying or retaining a copy of the PSR reviewed before sentencing, it may leave unregulated an inmate's access to his PSR through other means. Specifically, inmates may successfully access their PSRs through (1) FOIA requests, as recognized by the Supreme Court[4]; (2) requests addressed to the court when access to the PSR is needed by an inmate to prepare for post-sentencing proceedings such as appeal, motions to reduce sentence, or Section 2255 motions; or (3) requests for a copy from counsel.

We have no information about how often inmates are able to procure copies of PSRs in these ways after sentencing. FOIA requests are frequent enough for the BOP to promulgate specific procedures to accommodate these requests,[5] and for prosecutors to include FOIA waivers in plea agreements.[6] When a person confined in a BOP facility requests his PSR through a FOIA request, the BOP appears to be providing access without possession, which courts have held complies with the Act.[7]

Cases denying inmate requests for a copy of a PSR to prepare for post-sentencing proceedings have refuted any absolute right to obtain a copy of the PSR for this purpose.[8]

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[4] *U.S. Dep't of Justice v. Julian*, 486 U.S. 1 (1988). The report becomes an agency record and is accessible by way of an FOIA action filed in the district court where the inmate resides. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B)*; see also United States v. Pugh*, 69 F. App'x 628, 629–30 (4th Cir. 2003) (vacating district court's order finding Pugh had no right to a copy of his PSR under FOIA). *But see United States v. Williams*, 892 F.2d 75 (4th Cir. 1989) (unpublished table opinion) (finding that Williams' right under the FOIA to obtain a copy of his PSR from the Bureau of Prisons, the Parole Commission, or the Department of Justice is undisputed after *Julian*, but because the court is not an "agency" under the FOIA, the *court's* copy of the PSR may be obtained from the court only in the exercise of that court's discretion based upon a showing of need.).

[5] BOP 1351.05, *supra* note 3 (noting the right to obtain a PSR through FOIA). "Inmates are responsible for requesting an opportunity to access and review these records with unit staff in accordance with the Program Statement on Inmate Central File, Privacy Folder, and Parole Mini-Files. To facilitate inmate access and review, PSRs and SORs should ordinarily be maintained in the disclosable portion of the central file unless significant safety and security concerns dictate otherwise." *Id.* at 17. The policy contains detailed instructions concerning the application and disclosure process. *Id.* at 13–18.

[6] Not all courts will enforce such waivers. *Compare Price v. U.S. Dep't of Justice Attorney Office*, 865 F.3d 676, 684 (D.C. Cir. 2017) (holding that the district court should have declined to enforce Price's FOIA waiver on public-policy grounds) *with id.* at 690 (Brown, J., dissenting) ("Every criminal defense lawyer worth his salt will wonder why the Government should not be tasked with showing a 'legitimate criminal-justice' interest served with each and every right waived by a guilty plea. This will overhaul the plea process.").

[7] *See Martinez v. Bureau of Prisons*, 444 F.3d 620, 625 (D.C. Cir. 2006) (finding that an inmate who is afforded an opportunity to access and review his pre-sentence report is not entitled under the Freedom of Information Act ("FOIA") to possess a copy of his pre-sentence report if he is provided reasonable opportunities to access and review the pre-sentence report); *see also Pinson v. Dep't of Justice*, 236 F. Supp. 3d 338, 371 (D.D.C. 2017) (collecting cases); *United States v. Wellman*, 716 F. Supp. 2d 447, 463 (S.D.W. Va. 2010) (noting BOP policy allows only review, not possession).

[8] *See, e.g.*, *Pugh*, *supra* note 4 (finding that Pugh cannot claim denial of access where he has not yet attempted to initiate any collateral attack of his conviction); *United States v. Dickinson*, No. 1:14-CR-035, 2015 WL 5376460, at *4–5 (S.D. Ohio Sept. 14, 2015) (denying request, rejecting claim that defendant needs his PSR in order to preliminarily identify his constitutional claims for a motion to vacate, noting safety issues raised by possession of the PSR in facility, and that defendant knows his own information and had the opportunity to review the PSR with counsel prior to sentencing); *United States v. Pollard*, 747 F. Supp. 797, 806–07 (D.D.C. 1990) (finding no allegation that either defendant or prior counsel cannot recall the substance of these materials).

However, some decisions appear to leave open the question whether PSRs should be available for review for these proceedings,[9] and BOP policy recognizes that inmates may need a copy of the PSR to submit as part of those proceedings.[10]

As for inmates who procure copies of their PSRs from counsel, we note that case law reveals that at least some lawyers, when asked by clients for case files, have refused to provide the PSR; telling the clients they are willing to send the PSR if ordered to do so by the court.[11] Other lawyers may feel it is their ethical obligation to provide clients with the entire file.

Presumably Rule 32, a rule regulating the initial sentencing process, would not address access by defendants to copies of their PSR in post-sentencing contexts such as these. Yet the more frequently inmates are able to obtain copies of their PSRs after sentencing, the less effective an amendment to Rule 32 limiting possession before sentencing would be in preventing copies from entering corrections facilities.

B. What costs or concerns might be raised by an amendment to Rule 32 requiring provision of the PSR to counsel and pro se defendants only?

Though the current rule may not be constitutionally mandated,[12] this memo does not question the basic assumption underlying Rule 32(e)(2), which is that it is important for the defendant as well as counsel to have the opportunity to review the PSR to identify errors. Here we consider whether adding to the Rule some regulation of the manner in which counsel reviews the PSR with her client (such as forbidding possession by the client as part of review) might raise constitutional concerns, or might reduce the ability of the defense to correct errors in the PSR.

Courts have also rejected claims that the BOP policy barring possession of the PSR is a sufficient reason to toll the statute of limitations for filing a 2255 motion. *See, e.g., United States v. Cantu*, No. 4:05-CR-00008-7, 2013 WL 1010474, at *3–4 (W.D. Va. Mar. 14, 2013) (stating that petitioner could still have discovered the error in the PSR once he arrived at a BOP facility by reviewing his central file, and petitioner does not explain any investigation he undertook to read his PSR despite the BOP's pre-existing policy); *Eubanks v. United States*, No. CIV.A.5:07CV153, 2009 WL 1916352, at *2–3 (N.D.W. Va. July 1, 2009) (stating that petitioner reviewed his PSR and was apprised of its contents before sentencing, and even if he had not previously reviewed his PSR, he alleged no facts showing that he acted with the requisite diligence in requesting access to it).

[9] *United States v. Woodard*, No. 3:06-CR-50(2), 2008 WL 4793492, at *1–2 (N.D. Ind. Oct. 31, 2008) (denying request for copy of PSR "[u]nder the circumstances," where defendant waived his right to appeal or contest his sentence in his amended plea agreement, and the time for appeal and a § 2255 action had passed); *cf. United States v. Brody*, 705 F.3d 1277, 1283 (10th Cir. 2013) (holding even if claim were not moot, it would fail because of the insufficiency of the record provided, and noting "Brody has not provided this court with a copy of the presentence report identifying his prior criminal history or any other factors that could have had a bearing on his sentence").

[10] BOP 1351.05, *supra* note 3, at 17. ("Inmates needing a copy of their PSRs or SORs for filing as an attachment in a court case may obtain, complete, and submit to the court an Inmate Request For Certification or Judicial Notice of Pre-sentence Report and/or Statement of Reasons form (BP-S757.013). The form, which includes instructions for completion, must be available to inmates in the housing units and law libraries.").

[11] *E.g., Olshinski v. United States*, No. 1:05CR289-1, 2008 WL 2468748, at *1 (M.D.N.C. June 10, 2008) (denying motion to order counsel to provide a copy of the PSR).

[12] Several courts have rejected due process claims by represented defendants who claim they did not receive their PSRs, noting that there is no constitutional violation unless the defendant can show the court based its sentence on materially false or unreliable information. *See, e.g., Ratliff v. United States*, 999 F.2d 1023, 1028 (6th Cir. 1993) (finding no due process violation when defendant failed to show that the sentencing court relied on false information in a presentence report which he was not afforded the opportunity to review).

Sixth Amendment concerns. An amendment to Rule 32 that would restrict the manner in which counsel provides or allows review of a PSR by her client might raise Sixth Amendment concerns. If counsel cannot leave a copy of the PSR with the defendant to review on his own, does this infringe on effective representation? Case law considering the adequacy of the defendant's opportunity to review the PSR suggests that conditions for review that are far from ideal may suffice under the existing rule.[13] Cases alleging ineffective assistance by counsel in not providing review of the PSR often turn on whether the defendant can show some prejudice as a result of counsel's failure to allow more thorough review.[14]

Undermining the error correction function. Even if limiting how counsel provides review for a client does not rise to the level of a constitutional violation, such a procedural limitation might undercut the goal of ensuring the accuracy of the information in the PSR, the reason for the Committee's original decision to provide that the PSR must be furnished to the defendant as well as counsel. Adequate review may not be possible in a sit-down session with counsel. For counsel to stay with her client every minute the client has the PSR may be quite burdensome and unrealistic. Defendants may need time to review a long document, and may need to refer to other materials or consult others to check the accuracy of assertions in the PSR. A defendant may need help reading or translating the document, or may simply want a trusted friend or family member to look it over with him. Denying possession may hinder thorough review.

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[13] For example, a court found no error when, during brief continuance before sentencing, counsel obtained a translator to translate the PSR into Spanish and to discuss it with the Spanish-speaking defendant; and the defendant indicated at sentencing that he had received an opportunity to review his PSR "[a] few minutes ago in the cell block." *Baires v. United States*, 707 F. Supp. 2d 656 (E.D. Va. 2010), *appeal dismissed*, 399 F. App'x 811 (4th Cir. 2010). For additional examples, see *Martinez v. United States*, No. CR-11-00248-PHX-SRB, 2014 WL 5528216, at *11 (D. Ariz. Nov. 3, 2014) (assuming arguendo probation officer violated Rule 32 by failing to provide defendant with his own copy of the PSR, but denying relief in § 2255 case because defendant whose trial counsel read the PSR to him in its entirety during a video-telephone conference showed no prejudice); *Wehausen v. United States*, 820 F. Supp. 2d 128, 136 (D.D.C. 2011) (rejecting claim when counsel discussed on the telephone with client, the salient provisions of the report and had client meet with another to discuss the report).

[14] *See, e.g.*, *United States v. Soltero*, 510 F.3d 858, 863–64 (9th Cir. 2007) (finding that defendant must show prejudice if defendant did not have copy of PSR and attorney failed to discuss the PSR with defendant); *Melicharek v. United States*, No. 07 CR 907 SAS, 2013 WL 6500506, at *4 (S.D.N.Y. Dec. 11, 2013) (finding no prejudice for ineffective assistance of counsel claim when trial judge reviewed addendum to PSR in open court in "painstaking detail" after defendant said he had not received it); *Spragling v. United States*, No. 5:06 CR 0239, 2009 WL 2410475, at *3–4 (N.D. Ohio Aug. 4, 2009) (rejecting *Strickland* claim based on failure to receive PSR or review with counsel when defendant failed "to demonstrate that any erroneous information was included in the PSR"); *Torres-Flores v. United States*, No. 2:06-CR-470 TS, 2008 WL 2468360, at *7–8 (D. Utah June 17, 2008) (rejecting *Strickland* claim, noting "does not allege any error in the presentence report or any other reason why it would have made a difference had he been given a copy rather than reviewing it with his counsel"); *United States v. Vargas*, 469 F. Supp. 2d 752, 764 (D.N.D. 2007) (finding that failure of defense counsel to review the PSR with defendant prior to sentencing was not prejudicial for purposes of defendant's motion to vacate, set aside, or correct sentence on basis of counsel's ineffectiveness, when there was no reasonable probability the results of the sentencing hearing would have been any different absent the alleged error); *cf. Gonzalez v. United States*, 722 F.3d 118, 134–35 (2d Cir. 2013) (finding ineffective assistance when counsel did not see client until just before sentencing hearing, spent no more than 15 minutes discussing the PSR, did not accompany client to presentence interview, and client was unable to contact counsel "and was forced to obtain a copy of the PSR from the probation officer").

Other costs. Presently §6A1.2 of the United States Sentencing Guidelines also provides: "The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Rule 32(e)(2), Fed. R. Crim. P." Changing Rule 32 would presumably require changing the Guideline as well.

C. Is an amendment needed given potential changes to BOP regulations and other technological means to provide access without possession while incarcerated, and other options such as local rules, or policy changes for probation officers and clerk's offices?

Once the Subcommittee assesses the probable benefits and costs of an amendment to Rule 32, it may wish to compare that approach to other available options for addressing the problem.

A number of BOP policy changes under consideration by the Task Force might help to alleviate the problem of PSR access while a defendant is incarcerated in a BOP facility.

Additional options include an internal regulation or local rule requiring clerk's offices and probation officers to send any PSR that an inmate must receive to either counsel or the warden of the correctional facility in which the defendant is confined, barring provision of it to the inmate directly or through the mail. This seems to be the practice in at least two districts.[15]

We have also learned that Rule 32's mandate to give the PSR to the defendant already is implemented in several districts by providing a copy (or two copies) to counsel and not providing a separate copy to the defendant. Arguably, Rule 49(b) permits this, as it states "When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney *instead of the party*, unless the court orders otherwise." Reasonable minds could differ about whether Rule 49(b) should apply to Rule 32(e)(2), but it is at least an alternative reading that would not require an amendment to Rule 32 that the Subcommittee might want to consider.

[15] *See United States v. Bruton*, No. 1:09CR13-3, 2012 WL 2449870, at *1 (W.D.N.C. June 27, 2012) (stating that the Clerk of Court may not mail a copy of the Defendant's presentence report to him, noting BOP policy prohibits his possession of the report due to safety concerns)*; Fuller v. United States*, No. 5:07-CR-00159-D-1, 2011 WL 6304130, at *2 (E.D.N.C. Dec. 16, 2011) ("Local Criminal Rule 32.2(j), entitled "Receipt of Presentence Report Under Seal," states that: The final presentence investigation report, addendum, and probation officer's recommendation shall be received by the clerk under seal for inclusion in the record and shall be otherwise disclosed only upon order. Defendants and counsel may retain their copies of the presentence investigation report and addendum. In the event of post-sentencing proceedings, including appeal, *habeas corpus* application, or motion for modification or revocation of probation or supervised release, counsel of record may, upon request, be provided a copy of the presentence report by the probation office.").

TAB B.3

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 32(e)(2); 17-CR-C

DATE: September 23, 2017

This suggestion for an amendment arises from concerns Judge Molloy has received about the effect of Rule 32(e)(2) in cases involving cooperators. The rule provides:

> **(e) Disclosing the Report and Recommendation.**
>
> > **(1)** ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.
> >
> > **(2)** ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

The concern is that a rule requiring that inmates receive copies of their PSRs will exacerbate the problem of threats and harm to cooperators in prison. The Task Force on Protecting Cooperators has determined that inmates are often pressured to provide "their papers," i.e., court documents that would reveal whether the inmate cooperated. On its face, the rule gives the probation officer no discretion: the officer must provide the PSR not only to defense counsel, but also to the defendant. There is a waiver provision, but it focuses on "minimum period" of at least 35 days before sentencing.[1]

[1]We have not done a full review of the cases interpreting and applying the rule. Limited research found that when no disclosure was made or the disclosure was not timely, the courts generally focused on whether the error had been harmless. In light of the Rule 32(e)(2)'s clear command that the PSR be provided "to the defendant" as well as to "the defendant's attorney," it is not surprising that we found no cases holding that it was proper to withhold a PSR from the defendant.

The question for discussion in the October meeting is whether a subcommittee should be assigned to consider an amendment to Rule 32(e)(2).[2] For example, the Rule might be amended to provide that when defendants are represented by counsel, the probation officer must give the PSR to counsel, and counsel must review it with defendant.

To assist the Committee in making this determination, we describe below the history of the relevant provisions.

The Development of the Current Rule

The Committee Notes accompanying a series of amendments to Rule 32 reveal that requiring that the defendant be provided with his own copy of the PSR was intended to improve the accuracy of the sentencing process. Rule 32 was amended in a series of steps, beginning in 1983, that first gave the defendant (as well as his counsel) a right to read the PSR, then a right to receive copies of the PSR, which were required to be returned, and finally a right to receive the PSR with no further restrictions. From the outset there were certain exclusions from this disclosure which remain in the current rule.[3] For the Committee's convenience, the relevant portions of the Committee Notes are reprinted in the Appendix to this report; accordingly, we do not include footnotes for each quotation below.

In 1983, Rule 32 was amended to provide that both the defendant and his attorney must be given an opportunity "to read" most (but not all) portions of the PSR. The Committee Note stressed that the disclosure is to be made "to *both* the defendant *and* his counsel *without request*." (emphasis in original). The amendments were a response to the findings of a study of district court practices that concluded "the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information." The study found, inter alia, that only 13 districts were generally disclosing the PSR to both the defendant and counsel at least one day before sentencing. The Committee concluded:

> These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit

[2]A new subcommittee could be created, or the issue could be added to the agenda of the Cooperator Subcommittee.

[3]There were four exclusions from the report that the defense was allowed to read: (1) "any recommendations as to sentence," (2) disagnotic opinions if disclosure might seriously "disrupt" the defendant's rehabilitation, (3) "sources of information obtained on promise of confidentiality," and (4) other information that might "result in harm, physical or otherwise, to the defendant or other persons." These exclusions remain in the current rule. *See* Rule 32(d)(3) (carrying forward exclusions for certain diagnostic opinions, sources of confidential information, and information that might result in harm), and Rule 32(e)(3) (allowing direct the probation officer not to disclose the sentencing recommendation to anyone other than the court).

> the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated.

The Committee Note explained the importance of allowing the defendant – as well as his counsel – to review the PSR:

> Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.

The 1983 Rule also provided that unless the court ordered otherwise any copies of the presentence report that had been made available to the defendant, his attorney, or the government "shall be returned to the probation officer immediately following the imposition of the sentence or the granting of probation."[4] Finally, the Committee Note stated that the Committee had considered "[t]he issue of access to the presentence report at the institution, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power." The Note commented that "the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel."

In 1989, Rule 32 was revised to require that the PSR be provided to both the defendant and his lawyer, and to abrogate the requirement that the copies so provided be returned. However, the Committee Notes reflect a concern that the defendant's continued possession of the PSR might be dangerous. The 1989 Committee Note stated:

> The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy of the report until the defendant has been transferred to the facility where the sentence will be served.

Amendments in 1994 and 2002 completed the process. In 1994, Rule 32 was amended again to address timing, adding the requirement that the probation officer disclose the PSR to the defendant, his attorney, and the government 35 days before sentencing. There was also a slight change in the provision regarding the recommended sentence, giving the court the authority to determine whether that portion of the report would be disclosed. Finally, in the restyling process

[4]Rule 32(c)(3)(E), prior to amendment by Pub. L. 98-473 (Oct. 12, 1984).

completed in 2002, Rule 32 was reorganized, with the relevant provisions moving from (b) to (c). In describing the obligation to provide the PSR, the restyled rule substituted "give" for "furnish."

APPENDIX
RELEVANT HISTORY OF RULE 32(e)(2)
(bold added)

1983 Amendments

* * * *

Rule 32(a)(1). Subdivision (a)(1) has been amended so as to impose upon the sentencing court the additional obligation of determining that the defendant and his counsel have had an opportunity to read the presentence investigation report or summary thereof. This change is consistent with the amendment of subdivision (c)(3), discussed below, providing for disclosure of the report (or, in the circumstances indicated, a summary thereof) to *both* defendant *and* his counsel *without request*. This amendment is also consistent with the findings of a recent empirical study that under present rule 32 meaningful disclosure is often lacking and "that some form of judicial prodding is necessary to achieve full disclosure." Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv.L.Rev. 1613, 1651 (1980):

> The defendant's interest in an accurate and reliable presentence report does not cease with the imposition of sentence. Rather, these interests are implicated at later stages in the correctional process by the continued use of the presentence report as a basic source of information in the handling of the defendant. If the defendant is incarcerated, the presentence report accompanies him to the correctional institution and provides background information for the Bureau of Prisons' classification summary, which, in turn, determines the defendant's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs. The presentence report also plays a crucial role during parole determination. Section 4207 of the Parole Commission and Reorganization Act directs the parole hearing examiner to consider, if available, the presentence report as well as other records concerning the prisoner. In addition to its general use as background at the parole hearing, the presentence report serves as the primary source of information for calculating the inmate's parole guideline score.

Though it is thus important that the defendant be aware *now* of all these potential uses, the Advisory Committee has considered but not adopted a requirement that the trial judge specifically advise the defendant of these matters. The Committee believes that this additional burden should not be placed upon the trial judge, and that the problem is best dealt with by a form attached to the presentence report, to be signed by the defendant, advising of these potential uses of the report. This suggestion has been forwarded to the Probation Committee of the Judicial Conference.

Rule 32(c)(3)(A), (B) & (C). Three important changes are made in subdivision (c)(3): disclosure of the presentence report is no longer limited to those situations in which a request is made; **disclosure is now provided to both defendant and his counsel**; and disclosure is now required a reasonable time before sentencing. **These changes have been prompted by findings in a recent empirical study that the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information.** In 14 districts, disclosure is made only on request, and such requests are received in fewer than 50% of the cases. Forty-two of 92 probation offices do not provide automatic notice to defendant or counsel of the availability of the report; in 18 districts, a majority of the judges do not provide any notice of the availability of the report, and in 20 districts such notice is given only on the day of sentencing. In 28 districts, the report itself is not disclosed until the day of sentencing in a majority of cases. **Thirty-one courts generally disclose the report only to counsel and not to the defendant, unless the defendant makes a specific request. Only 13 districts disclose the presentence report to both defendant and counsel prior to the day of sentencing in 90% or more of the cases. Fennell & Hall, supra, at 1640-49.**

These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated. Similarly, if the report is not made available to the defendant and his counsel in a timely fashion, and if disclosure is only made on request, their opportunity to review the report may be inadequate. **Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.**

The additional change to subdivision (c)(3)(C) is intended to make it clear that the government's right to disclosure does not depend upon whether the defendant elects to exercise his right to disclosure.

Rule 32(c)(3)(E) & (F). Former subdivisions (c)(3)(D) and (E) have been renumbered as (c)(3)(E) and (F). The only change in the former, necessitated because disclosure is now to defendant and his counsel.

* * * *

The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

1989 Amendments

* * * *

The language requiring the court to provide the defendant and defense counsel with a copy of the presentence report complements the abrogation of subdivision (E), which had required the defense to return the probation report. Because a defendant or the government may seek to appeal a sentence, an option that is permitted under some circumstances, there will be cases in which the defendant has a need for the presentence report during the preparation of, or the response to, an appeal. This is one reason why the Committee decided that the defendant should not be required to return the nonconfidential portions of the presentence report that have been disclosed. Another reason is that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines. They would be inhibited unnecessarily from relying on careful, accurate presentence reports if such reports could not be retained by defendants. A third reason why defendant should be able to retain the reports disclosed to them is that the Supreme Court's decision in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), 108 S.Ct. 1606 (1988), suggests that defendants will routinely be able to secure their reports through Freedom of Information Act suits. No public interest is served by continuing to require the return of reports, and unnecessary FOIA litigation should be avoided as a result of the amendment to Rule 32.

The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy of the report until the defendant has been transferred to the facility where the sentence will be served.

* * * *

1994 Amendments

* * * * *

Subdivision (b). Subdivision (b) (formerly subdivision (c)), which addresses the presentence investigation, has been modified in several respects.

* * * * *

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (changing former subdivision (c)(3)(A)), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure. The prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

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TAB 5

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TAB 5A

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 16 – Pretrial Disclosure of Expert Testimony (Suggestions 17-CR-B & 17-CR-D)**

DATE: **March 29, 2018**

This memorandum describes the two proposals to amend Rule 16 to provide more complete pretrial disclosure of expert testimony.

Discussion of the first of these proposals, by Judge Jed Rakoff, was tabled at the October Criminal Rules Committee meeting because of a concern that the Evidence Rules Committee might propose revisions concerning expert testimony that would be relevant to pretrial disclosures under Rule 16.

There have been two changes since the October meeting. First, the reporters and Judge Molloy were informed by Judge Debra Ann Livingston, chair of the Evidence Rules Committee, and Professor Dan Capra, the reporter, that they see no impediment to consideration of changes in Rule 16. Second, the Criminal Rules Committee received a second proposal to amend Rule 16, authored by Judge Paul Grimm, a former member of the Civil Rules Committee.

At Judge Molloy's request the Rule 16.1 Subcommittee held a teleconference to discuss the two proposals before the April meeting, where the question will be whether the Committee should undertake detailed consideration of amending the provisions governing pretrial disclosure of expert testimony. Subcommittee members agreed that the subject of pretrial disclosure of expert witnesses is a significant issue that warrants the Committee's consideration. However, as discussed later in this memorandum, there was some sentiment for deferring consideration. The Subcommittee reached no consensus on the question how soon to begin consideration of possible amendments to Rule 16.

Section 1 of this memorandum describes the Rakoff and Grimm proposals. Section 2 describes the Subcommittee's discussion. Section 3 provides background concerning the legislative history of the relevant portion of Rule 16.

1. The Proposals

Judge Jed Rakoff (17-CR-B), co-chairman of the National Commission on Forensic Science, wrote suggesting that the Committee consider amending Rule 16(a)(1)(G) to parallel Civil Rule 26(a)(2)(B) governing pretrial disclosure of the testimony to be given by expert witnesses.

Judge Rakoff explained that the provisions of Rule 16 are couched in much vaguer language than the parallel provisions of Rule 26 of the Civil Rules, and as a result (as the caselaw

and everyday experience both attest) pre-trial expert disclosures in federal criminal cases are frequently much more minimal than the comparable expert disclosures in civil cases. This poses a serious problem: counsel are frequently blindsided by expert testimony given in criminal cases. Judge Rakoff also noted that research has tied inaccurate expert testimony to wrongful convictions, including those later exposed by DNA testing.

These concerns led the National Commission on Forensic Science overwhelmingly to approve a recommendation to the Department of Justice that the Department, notwithstanding the vague language of Rule 16, voluntarily agree to make the same kind of disclosures in federal criminal cases as Rule 26 of the Civil Rules mandates in civil cases.

Although the Department accepted the National Commission's recommendation and issued a memorandum to federal prosecutors in January, 2017, Judge Rakoff nonetheless advocates an amendment to the Criminal Rules for several reasons. First, the DOJ memorandum does not have the force of law; if the government fails to comply, the defense cannot seek judicial enforcement or any other remedy. Second, there has been and likely will continue to be very wide variance among U.S. Attorney's Offices, and even among individual AUSAs, as to how much or little has to be disclosed before an expert witness is called to testify in a federal criminal case. Seeing no reason why pretrial disclosure of expert testimony should be any more restricted in criminal than civil cases, Judge Rakoff recommends an amendment to Rule 16 to parallel Civil Rule 26(a)(2)(B). His suggestion would also affect all government experts, not just the forensic experts addressed by the National Commission and the Department's new guidance to prosecutors. Disclosure by the government under Rule 16(a)(1)(G) is triggered by a defense request, which in turn triggers a reciprocal obligation for defense discovery under Rule 16(b)(1)(C). Judge Rakoff did not address defense discovery.

Judge Paul Grimm (17-CR-D) provided the Committee with a short article proposing that Rule 16 be amended to parallel more closely Civil Rule 26(a)(2)'s requirements for pretrial discovery of expert testimony. Judge Grimm begins (pp. 4-11) with a description of the challenges district judges face in making expert admissibility rulings in criminal cases: the pressure of the speedy trial requirements, the breadth of expert testimony introduced in criminal cases, the pressure on defendants to plead guilty quickly, and difficulty in obtaining defense experts. The final factor, in Judge Grimm's view, is the "[i]nsufficiently detailed disclosure of expert witnesses under the criminal procedure rules." (pp. 11-15). After comparing Rule 16(a)(1)(G) with Civil Rule 26(a)(2)(A) and (B), he concludes (p. 13) that "the expert disclosures required by the rules of civil procedure are far more robust, detailed and helpful to the recipient than those required by the criminal procedure rules."

In practice, Judge Grimm concludes (pp. 13-14), expert discovery in criminal cases is inadequate from the perspective of both the defense and the court:

> . . . In contrast to the comprehensive disclosures in civil cases, in criminal cases, most of the expert disclosures I have seen (and remember that the trial judge does not see the

> disclosure unless there is a challenge, because the disclosure only is served on the defense attorney, not docketed on the court record) were cursory as well as conclusory, and not particularly useful for cross-examining the expert or challenging her testimony. And they certainly were insufficient to be of much help to me in making a ruling on admissibility of the expert's opinions.

Like Judge Rakoff, Judge Grimm notes that the DOJ Guidance is helpful but not sufficient. He observes (p. 15):

> The DOJ Supplemental Guidance, if it continues as DOJ policy, and to the extent that line prosecutors adhere to it, will go a long way to bolster the anemic disclosure requirements currently found in Rule 16(a)(1)(G). But the effectiveness of the DOJ Supplemental Guidance is muted by its narrow application to forensic evidence and expert reports, as opposed to the many other types of expert testimony (referenced above) that are common to criminal prosecutions.

Accordingly, Judge Grimm recommends (p. 21) "that the Criminal Rules Advisory Committee consider amending Rule 16 to enhance the Rule 16(a)(1)(G) and (b)(1)(C) expert disclosures," making the Criminal Rule "more closely resemble the disclosures required in civil cases by Fed. R. Civ. P. 26(a)(2)."

> At a minimum, Rule 16 disclosures should include: (1) a complete statement of each opinion the expert will testify to, as well as the basis and reasons supporting them; (2) a summary of the facts or data considered (not just relied on) by the witness in forming his or her opinions; and (3) a description of the witness's qualifications. In addition, while less important, it would also bolster Rule 16 if the disclosures included a list of cases in the past 4 years where the witness had testified (allowing counsel to read the prior testimony), and a copy of any exhibits that will be used by the expert in support of his or her testimony.

2. The Issue for Discussion

The question before the Subcommittee was whether to recommend that the Criminal Rules Committee undertake a full examination of these two suggestions, and the appropriate timing of this undertaking.

Subcommittee members agreed that pretrial disclosure of expert testimony is a significant issue, and that it would be not as straightforward as the recent Rule 16.1 project.

Discussion focused on the impact of the Department of Justice Guidance, issued in January 2017 in response to the Commission's recommendations. Both Judge Rakoff and Judge Grimm thought that the Guidance was helpful, but that a rule amendment is nonetheless warranted. Unlike the DOJ Guidance, a rule would be enforceable by the courts. Judge Grimm noted that the DOJ Guidance covers only forensic experts, and members recognized different kinds of experts may

require different treatment. Also, the DOJ Guidance does not (and obviously cannot) require reciprocal defense discovery. The Rakoff and Grimm proposals do not discuss the issues that may be raised by reciprocal defense discovery.

Mr. Wroblewski stressed that replicating Civil Rule 26 for criminal cases may create some problems if it is not adapted to the criminal context. For example, unlike Rule 26, the DOJ Guidance requires the use of accredited providers who must prepare written reports for the file. The Guidance also requires federal prosecutors to turn over the whole file including those reports. If a new rule would require the preparation of a duplicative report, the Department would oppose that additional burden on an already backlogged system.

Some members thought that it would be desirable to gain more experience under the Guidance before considering amendments to Rule 16. Mr. Wroblewski (who represented the Department on the National Commission) explained that the Guidance has been endorsed by the current administration, and all federal prosecutors have been required to undergo training. However, the development of the training materials took some time, and the training was not completed until the end of 2017. Because there has been so little experience under the Guidance, some members thought that it would be beneficial to wait a year or so before undertaking an in depth review of the issues.

Subcommittee members thought that it would be important for the rulemaking process to be guided by information concerning the current use of experts—which might include a mini-conference and/or research by the Federal Judicial Center—but it reached no consensus on how soon to begin this process.

3. Previous Committee Action

The difference in the scope of pretrial disclosure concerning expert witnesses arose in 1993, when both the Civil and Criminal Rules were amended to address this issue.[1] Rule 16(a)(1)(G) requires disclosure by the government of only a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. It further specifies that "The summary provided under this sub-paragraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." As Judge Rakoff explained, these summaries may be produced by the prosecutor, not the witness, and in some instances are extremely short and general (a paragraph or two). Also, as Judge Grimm noted (p. 13), the Criminal Rule does not require disclosure of the

[1]As the Committee's June 1991 report to the Standing Committee explained at page 2: "The proposed amendments [to Rule 16] would generally parallel similar provisions in Federal Rule of Civil Procedure 26 and would expand discovery to both the defense and the government." This point was also emphasized in the committee note as published, which stated that the addition of the subdivision that is now (b)(1)(G) "tracks closely with similar language in Federal Rule of Civil Procedure 26 . . . ."

facts or data considered by the expert (not merely those the expert intends to rely on), or the exhibits that will be used to summarize or support the expert's testimony.

In contrast, Civil Rule 26(a)(2)(B) requires that an expert witness who is expected to testify at trial must provide a "written report," and it describes in greater detail what this report must include.[2] It provides (emphasis added):

> **(B) Witnesses Who Must Provide a Written Report.** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
>
> > (I) a complete statement of all opinions the witness will express and the basis and reasons for them;
> >
> > (ii) the facts or data considered by the witness in forming them;
> >
> > (iii) any exhibits that will be used to summarize or support them;
> >
> > (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> >
> > (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> >
> > (vi) a statement of the compensation to be paid for the study and testimony in the case.

[2]For a subgroup of witnesses, only a summary is required in civil cases. A witness is not required to provide a written report if he has not been "retained or specially employed to provide expert testimony in the case" or his duties as the party's employee do not "regularly involve giving expert testimony." In these circumstances, Civil Rule 26(a)(2)C) requires only disclosure stating:

> (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
>
> (ii) a summary of the facts and opinions to which the witness is expected to testify.

At the time of publication for public comment in 1990, the Civil and Criminal provisions concerning expert discovery were parallel, but after publication the Criminal Rule was revised at the urging of the Department of Justice. The minutes from the Committee's April 1992 meeting (provided below) state that the Department "expressed strong opposition to the amendment" as published. The Department's representative to the Committee stated there had been no real problems requiring the amendment. But the amendment would cause difficulties if the government did not know in advance of trial which witnesses it would call, especially summary witnesses. Later in the discussion, the representative also expressed concern that the amendment would require the government to present its theory of the case to the defendant before trial.

The language ultimately adopted was presented in a motion to narrow the amendment to respond to the Department's concerns. After the Committee deadlocked 5 to 5 on this vote, the chair voted in favor of the revision, breaking the tie.

The language adopted in 1993 was restyled in 2002 (which resulted in relettering the provision in question).

An excerpt from the 1992 Committee minutes is provided below.

Excerpt April 1992 Minutes
Advisory Committee on Criminal Rules
Pages 3-5

* * * * *

2. Rule 16(a). Disclosure of Experts.

The Reporter informed the Committee that the proposed amendment to Rule 16(a) had generated some comments from the public. Several had raised the issue of the scope of the rule, the lack of specific timing requirements, the relationship between this provision and others in Rule 16, and the difficulty of knowing in advance of trial which experts would be called to testify.

Mr. Karas moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Doar seconded the motion.

Mr. Pauley referred to a letter sent by the Justice Department to the Advisory Committee which expressed strong opposition to the amendment. He noted that there did not seem to be any real problems which required the amendment and that the Committee should consider the full panoply of experts that would potentially fall within this amendment. In particular, he noted that "summary" experts would be covered and that the amendment did not cover problems which would arise if the government did not know in advance of trial which witnesses it would call. Judge Hodges noted the Department's letter in opposition to the amendment had been received by the Committee almost two months after the official comment period ended.

Professor Saltzburg endorsed the concept of the amendment. He indicated that the language "at the request of the defendant," should stay in and observed that if problems develop with application there will be time for any further amendments. He indicated that the problem of the parties not knowing who the witnesses would be could be addressed by extending the amendment only to those witness that a party "expected" to call. Mr. Marek echoed Professor Saltzburg's support for the amendment and disagreed with the Department's assertions that defendants are not currently being surprised by government experts.

Judge DeAnda spoke in favor of the amendment and noted that the timeliness requirements would affect both the government and the defense. Judge Jensen added that the underlying concept of the Rule was good but that he was opposed to the requirement for a written report. Mr. Pauley again expressed concern about the amendment and added that it would require the government to present its theory of the case to the defendant before trial.

After some additional discussion on the options available to the Committee, the chair called the question on the existing motion to send the amendment forward as published. That motion failed by a vote of 8 to 2.

Professor Saltzburg then moved that changes be made in the amendment which would address some of the concerns raised during the discussion:

> "At the defendant's request, the government must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications."

Mr. Marek seconded the motion. Mr. Doar expressed some concern about whether the new language should leave out the reference to the underlying data relied upon by the expert witness. Mr. Pauley noted that the new language addressed some of the concerns raised by the Department of Justice but in an extended discussion of the issue, stated that the amendment and the debate it would generate were not needed because currently no problem exists. In his view, the amendment goes far beyond what is necessary and will generate needless litigation. The suggestion was made that the Committee Note to the amendment note some distinction between non-expert "summary" witnesses.

The Committee's vote on the motion was ultimately 5 to 5. But the motion carried on the tie-breaking vote by the Chair, Judge Hodges. Professor Saltzburg then moved that the Committee recommend to the Standing Committee that no further public comment be sought on the amendment. That vote as well was a tie vote (5 to 5) but ultimately carried when the Chair voted in the affirmative.

Professor Saltzburg thereafter moved that conforming changes be made in Rule 16(b)(1)(C), that they be forwarded to the Standing Committee with the recommendation that no further public comment be solicited. That motion was seconded by Mr. Marek and carried by a unanimous vote.

In further discussion on Rule 16, Judge Keenan suggested that the Committee Note should indicate the potential problems with fungible experts and the amendment is not intended to create unreasonable procedural hurdles. Mr. Marek expressed concern about disclosure of experts who are not fungible. It was noted by several members during the ensuing discussion that Rule 16(d) provides an avenue of relief for both sides.

TAB 5B

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TAB B.1

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[redacted]
Sent: Sunday, July 23, 2017 9:01 PM
To: John Siffert
Subject: Pre-Trial Expert Discovery

Dear John,

Following up on our conversation of the other evening, and writing to you in your capacity as a member of the federal criminal rules committee, I would like to suggest that Rule 16 of the federal criminal rules be amended so that experts are required by Rule 16 to make the same sort of detailed pre-trial reports and disclosures as are required in federal civil cases by Rule 26 of the Federal Rules of Civil Procedure. As it stands now, the expert discovery provisions of Rule 16 of the criminal; rules are couched in much vaguer language than the parallel provisions of Rule 26 of the civil rules, and the result is (as the caselaw and everyday experience both attest) that the pre-trial expert disclosures in federal criminal cases are frequently much more minimal than the comparable expert disclosures in civil cases. Since it is obvious that one cannot meaningfully challenge an expert's testimony without substantial pre-trial discovery, the result is that counsel are frequently blindsided by expert testimony given in criminal cases. This may be part of the reason why, according to the Innocence Project, inaccurate expert testimony was a factor in over half of the wrongful convictions later reversed by DNA testing done by the Innocence Project. And, according to the National Registry of Exonerations maintained by the University of Michigan, of the more than 2,000 criminal convictions reversed since 1989 on the basis of post-conviction factual exoneration, the single largest factor common to the wrongful convictions was inaccurate expert testimony.

In June of 2016, the National Commission on Forensic Science overwhelmingly approved a recommendation to the Department of Justice that the Department, notwithstanding the vague language of Rule 16, voluntarily agree to make the same kind of disclosures in federal criminal cases as Rule 26 of the federal civil rules mandates in civil cases. The NCFS recommendation is attached below. In response, the Department issued a Memorandum in January of this year largely agreeing with that recommendation and, indeed, reminding federal prosecutors of prior DOJ memos suggesting much the same. That memo is also attached below. None of this, however, has the force of law, and high-level Department officials have admitted to me that, in fact, there has been very wide variance among U.S. Attorney's Offices, and even among individual AUSAs, as to how much or little has to be disclosed before an expert witness is called to testify in a federal criminal case. Even where very little was disclosed, moreover, the vagueness of Rule 16 has resulted in few defense counsel challenging even the most bare-bones expert disclosures and, in those few cases where such challenges have been made, they have very, very rarely succeeded: -- hence the need to revise Rule 16. At the same time, the Department's positive attitude, as reflected in its memo attached below, suggests that it would not strenuously oppose the suggested revision of Rule 16 (except perhaps to claim it was "unnecessary"). And, frankly, I cannot think of a single reason why the policy considerations that led the framers of Rule 26 to draft specific requirements for expert disclosures do not apply with the same or even greater force in the criminal context. Accordingly, the two rules should be made more or less identical.

Thank you for considering this proposal.

Jed Rakoff

NATIONAL COMMISSION ON FORENSIC SCIENCE

NIST National Institute of Standards and Technology U.S. Department of Commerce

Recommendations to the Attorney General
Pretrial Discovery

Subcommittee
Reporting and Testimony
Status
Adopted by the Commission

Date of Current Version	08/05/16
Approved by Subcommittee	11/05/16
Approved by Commission	21/06/16
Action by Attorney General	[*dd/mm/yy*] 05/01/17

Commission Action
On June 21, 2016, the Commission voted to adopt this Recommendation by a more than two-thirds majority affirmative vote (78% yes, 18% no, 3% abstain)

Recommendations
The National Commission on Forensic Science recommends that the Attorney General take the following actions:

- **Recommendation #1: The Attorney General should direct federal prosecutors, when they intend to offer expert testimony on forensic science test results and conclusions, to provide to the court and defense counsel, reasonably in advance of trial, a report prepared by this expert that contains:**
  - **(i) a statement of all opinions the witness will express and the basis and reasons for them;**
  - **(ii) the facts or data considered by the witness in forming them;**
  - **(iii) any exhibits that will be used to summarize or support them;**
  - **(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
  - **(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
  - **(vi) a statement of the compensation to be paid the witness.**

With three modifications, this Recommendation tracks Federal Rule of Civil Procedure 26(a)(2)(B). Because of speedy trial and case management concerns, "reasonably in advance of trial" has been substituted for the 90-days-before-trial disclosure requirement of the Civil Rule, but the Commission expects that "reasonably in advance of trial" will usually mean at least a few weeks before trial and with sufficient time for the defense to consult with and/or secure expert assistance. Also, although the Civil Rule requires "a *complete* statement of all opinions," the Recommendation excises the word "complete" in the belief that it is at best confusing and at worst

unnecessarily burdensome. Finally, the Commission intends that the listing requirement of (v) take effect prospectively, as not all forensic experts may have kept such lists in the past.

- **Recommendation #2: The Attorney General should direct federal prosecutors to allow the defendant full access to the expert's case record.**

As depositions of an adversary's expert witnesses are not permitted in federal criminal cases, access to the expert's underlying case record is proposed to mitigate the absence of discovery depositions and to allow the adversary party to examine the underlying data on which the expert's opinions are based (subject to any judicial protective order).

- **Recommendation #3: To the extent the aforementioned disclosures exceed what is presently required by federal law, the Attorney General should authorize federal prosecutors to condition such additional disclosures on the defense's agreeing to provide the same broad disclosures if the defense intends to offer forensic expert testimony.**

Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant who intends to offer expert testimony to give the government the same kind of disclosure that the government is required to give the defendant under 16(a)(1)(G). But because the discovery proposed by the Commission's recommendations would go beyond what is required by 16(a)(1)(G), it seems only fair for the government, if it chooses, to condition such additional disclosure on the defendant's agreement that it will make the same broad disclosures if it intends to offer forensic expert testimony of its own (subject to any claim of privilege upheld by the court).

Commentary

The need for pretrial discovery of forensic evidence in criminal cases is critical—for both the prosecution and defense—because "it is difficult to test expert testimony at trial without advance notice and preparation."[1] Indeed, in a number of the cases in which convicted defendants were subsequently exonerated by DNA testing, the failure to disclose exculpatory forensic evidence played a role in the wrongful convictions.[2] There are many other advantages to comprehensive discovery as well. Even in the case of DNA, according to President Bush's DNA Initiative[3], "[e]arly disclosure can have the following benefits: [1] Avoiding surprise and unnecessary delay. [2] Identifying the need for defense expert services. [3] Facilitating exoneration of the innocent and encouraging plea negotiations if DNA evidence confirms guilt." These benefits likewise apply to other forensic evidence. Providing forensic science test results, opinions, and conclusions reasonably in advance of trial is also critical to facilitating a comprehensive and scientific review of the data. Such disclosures will allow opposing experts to sufficiently review the scientific findings to provide appropriate guidance to counsel and help form their own opinions.

Nevertheless, notwithstanding the great need for pretrial disclosure, discovery regarding forensic evidence intended to be offered in criminal cases is not required to be nearly as

[1] Fed. R. Crim. P. 16 (1975), advisory committee's note.
[2] *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 108 (2011).
[3] National Institute of Justice, President's DNA Initiative: Principles of Forensic DNA for Officers of the Court (2005).

expansive or as timely as in civil litigation. Ironically, this is despite the fact that, under federal law, experts can be deposed in civil cases but not in criminal cases, so that the need for substantial pretrial written disclosure would seem to be even greater in criminal cases than in civil cases if trial by ambush is to be avoided. Historically, this disparity has been justified on three grounds: substantial pretrial discovery in criminal actions will (1) encourage perjury, (2) lead to the intimidation of witnesses, and (3) be a one-way street because of the Fifth Amendment privilege against self-incrimination.[4] With forensic evidence, however, these traditional arguments against criminal discovery lose whatever force they might otherwise have. The first argument fails because "it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure."[5] Also, there is no evidence that the intimidation of experts is a major problem, both because in federal practice, the expert is often a government employee, and because the evidence can often be reexamined, if necessary, by another expert.[6] Finally, the Self-incrimination Clause, as presently interpreted by the Supreme Court, is not an impediment to the prosecution's obtaining pretrial discovery regarding forensic science that the defendant intends to offer.[7]

Although Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government, on defendant's request, to provide a summary of a forensic expert's "opinions, the bases and reasons for those opinions, and the witness's qualifications," this provision, perhaps because of the aforementioned history, has often been narrowly interpreted by the government and the courts. By contrast, Federal Rule of Civil Procedure 26(a)(2) not only sets forth in much greater detail what disclosures regarding expert testimony must be made prior to trial but also provides that such disclosure, absent court order, must be made well in advance of trial. The need for meaningful and timely discovery in relation to expert testimony is particularly acute in the case of forensic science, where questionable forensic science has often gone unchallenged. The Commission is therefore of the view that the Attorney General, both as a matter of fairness and also to promote the accurate determination of the truth, should require her assistants to make pretrial disclosure of forensic science more in keeping with what the federal civil rules presently require than the more minimal requirements of the federal criminal rules. *See* Recommendation #1, above. Further, in the absence of depositions, the defendant should have access to the expert's case record. *See* Recommendation #2, above. Finally, to the extent permitted by law, the defense should also be reciprocally required to make these enhanced disclosures. *See* Recommendation #3, above.

It should be noted that the foregoing recommendations, designed to achieve the purposes summarized above, are a direct application to the particularities of *federal* practice of the Views Document on Discovery adopted by this Commission on August 11, 2015. Application to *state* practice might require different modifications.

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[4] *See* 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 252, at 36-37 (2d ed. 1982).

[5] Commentary, ABA Standards for Criminal Justice, Discovery and Procedure Before Trial 67 (Approved Draft 1970).

[6] 2 Wayne LaFave & Jerod Israel, Criminal Procedure § 19.3, at 490 (1984) ("Once the report is prepared, the scientific expert's position is not readily influenced, and therefore disclosure presents little danger of prompting perjury or intimidation.").

[7] *See* Williams v. Florida, 399 U.S. 78, 85 (1970) ("At most, the [discovery] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."); United States v. Nobles, 422 U.S. 225, 234 (1975) (compelled production of defense investigator's notes does not violate the Fifth Amendment because it involved no compulsion of the defendant).

The Deputy Attorney General

Washington, D.C. 20530

January 5, 2017

MEMORANDUM FOR DEPARTMENT PROSECUTORS
DEPARTMENT FORENSIC SCIENCE PERSONNEL

FROM: Sally Q. Yates
Deputy Attorney General

SUBJECT: Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts

Forensic evidence is an essential tool in helping prosecutors ensure public safety and obtain justice for victims of crime. When introduced at trial, such evidence can be among the most powerful and persuasive evidence used to prove the government's case. Yet it is precisely for these reasons that prosecutors must exercise special care in how and when forensic evidence is used. Among other things, prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them.

In January 2010, then-Deputy Attorney General David Ogden issued a memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* (the "Ogden Memo"), which provided general guidance on gathering, reviewing, and disclosing information to defendants.[1] Given that most prosecutors lack formal training in technical or scientific fields, the Department has since determined that it would be helpful to issue supplemental guidance that clarifies what a prosecutor is expected to disclose to defendants regarding forensic evidence or experts. Over the past year, a team of United States Attorneys, Department prosecutors, law enforcement personnel, and forensic scientists worked together to develop the below guidance, which serves as an addendum to the Ogden Memo.

All Department prosecutors should review this guidance before handling a case involving forensic evidence. In addition, any individuals involved in the practice of forensic science at the Department, especially those working at our law enforcement laboratories, should familiarize themselves with this guidance so that they can assist prosecutors when the government receives a request for discoverable material in a case. Thank you for your attention to this issue and for the work you do every day to further the proud mission of this Department.

[1] Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, January 4, 2010, available at http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf.

SUPPLEMENTAL GUIDANCE FOR PROSECUTORS REGARDING CRIMINAL DISCOVERY INVOLVING FORENSIC EVIDENCE AND EXPERTS[1]

Forensic science covers a variety of fields, including such specialties as DNA testing, chemistry, and ballistics and impression analysis, among others. As a general guiding rule, and allowing for the facts and circumstances of individual cases, prosecutors should provide broad discovery relating to forensic science evidence as outlined here. Disclosure of information relating to forensic science evidence in discovery does not mean that the Department concedes the admissibility of that information, which may be litigated simultaneously with or subsequent to disclosure.

The Duty to Disclose, Generally

The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act (18 U.S.C. §3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, §9-5.001 of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material.

Rule 16 of the Federal Rules of Criminal Procedure establishes three disclosure responsibilities for prosecutors that may be relevant to forensic evidence. First, under Fed. R. Crim. P. 16(a)(1)(F), the government must, upon request of the defense, turn over the results or reports of any scientific test or experiment (i) in the government's possession, custody or control, (ii) that an attorney for the government knows or through due diligence could know, and (iii) that would be material to preparing the defense or that the government intends to use at trial. Second, under Fed. R. Crim. P. 16(a)(1)(G), if requested by the defense, the government must provide a written summary of any expert testimony the government intends to use at trial. At a minimum, this summary must include the witness's opinions, the bases and reasons for those opinions, and the expert's qualifications. Third, under Fed. R. Crim. P. 16(a)(1)(E), if requested by the defense, the government must produce documents and items material to preparing the defense that are in the possession, custody, or control of the government. This may extend to records documenting the tests performed, the maintenance and reliability of tools used to perform those tests, and/or the methodologies employed in those tests.

Both the Jencks Act and *Brady/Giglio* may also come into play in relation to forensic evidence. For example, a written statement (report, email, memo) by a testifying forensic witness may be subject to disclosure under the Jencks Act if it relates to the subject matter of his or her testimony. Information providing the defense with an avenue for challenging test results may be *Brady/Giglio* information that must be disclosed. And, for forensic witnesses employed by the government, *Giglio* information must be gathered from the employing agency and reviewed for possible disclosure.

These are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds.

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[1] This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

The Duty to Disclose in Cases with Forensic Evidence and Experts

The Department's policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence. Rule 16's disclosure requirements – disclosing the results of scientific tests (16(a)(1)F)), the witness' written summary (16(a)(1)(G)), and documents and items material to preparing the defense (16(a)(1)(E)) – are often jointly satisfied when presenting expert forensic testimony, since disclosure of the test results, the bases for those results, and the expert's qualifications will often provide all the necessary information material to preparation of the defense. But, depending on the complexity of the forensic evidence, or where multiple forensic tests have been performed, the process can be complicated because it may require the prosecutor to work in tandem with various forensic scientists to identify and prepare additional relevant information for disclosure. Although prosecutors generally should consult with forensic experts to understand the tests or experiments conducted, responsibility for disclosure ultimately rests with the prosecutor assigned to the case.

In meeting obligations under Rule 16(a)(1)(E), (F), and (G), the Jencks Act, and *Brady/Giglio*, and to comply with the Department's policies of broad disclosure, the prosecutor should be attuned to the following four steps:

1. First, the prosecutor should obtain the forensic expert's laboratory report, which is a document that describes the scope of work assigned, the evidence tested, the method of examination or analysis used, and the conclusions drawn from the analyses conducted. Depending on the laboratory, the report may be in written or electronic format; the laboratory may routinely route the report to the prosecutor, or the prosecutor may need to affirmatively seek the report from the forensic expert or his or her laboratory. In most cases the best practice is to turn over the forensic expert's report to the defense if requested. This is so regardless of whether the government intends to use it at trial or whether the report is perceived to be material to the preparation of the defense. If the report contains personal information about a victim or witness, or other sensitive information, redaction may be appropriate and necessary. This may require court authorization if the forensic expert will testify, as the report likely will be considered a Jencks Act statement. (See the Additional Considerations section below.)

2. Second, the prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached. Although the written summary will vary in length depending on the number and complexity of the tests conducted, it should be sufficient to explain the basis and reasons for the expert's expected testimony. Oftentimes, an expert will provide this information in an "executive summary" or "synopsis" section at the beginning of a report or a "conclusion" section at the end. Prosecutors should be mindful to ensure that any separate summary provided pursuant to Rule 16(a) should be consistent with these sections of the report. Further, any changes to an expert's opinion that are made subsequent to the initial disclosure to the defense ordinarily should be made in writing and disclosed to the defense.

3. Third, if requested by the defense, the prosecutor should provide the defense with a copy of, or access to, the laboratory or forensic expert's "case file," either in electronic or hard-copy form. This information, which may be kept in an actual file or may be compiled by the forensic expert, normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted.

   In some circumstances, the defense may seek laboratory policies and protocols. To the extent that a laboratory provides this information online, the prosecutor may simply share the web address with the defense. Otherwise, determinations regarding disclosure of this information should be made on a case-by-case basis in consultation with the forensic analysts involved, taking into account the particularity of the defense's request and how relevant the request appears to be to the anticipated defenses.

4. Fourth, the prosecutor should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition. The prosecutor should gather potential *Giglio* information from the government agency that employs the forensic expert. If using an independent retained forensic expert, the prosecutor should disclose the level of compensation as potential *Giglio* information; the format of this disclosure is left to the discretion of the individual prosecuting office.

Disclosure should be made according to local rules but at least as soon as is reasonably practical and, of course, reasonably in advance of trial. It is important that the prosecutor leave sufficient time to obtain documents and prepare information ahead of disclosure. When requesting supporting documents from a laboratory's file regarding a forensic examination, the prosecutor should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for them to process and deliver the materials to the prosecutor. Further, if multiple forensic teams have worked on a case, the prosecutor should build in sufficient time to consult with, and obtain relevant materials from, each relevant office or forensic expert.

Additional Considerations

Certain situations call for special attention. These may include cases with classified information or when forensic reports reveal the identities of cooperating witnesses or undercover officers, or disclose pending covert investigations. In such cases, when redaction or a protective order may be necessary, prosecutors should ordinarily consult with supervisors.

Laboratory case files may include written communications, including electronic communication such as emails, between forensic experts or between forensic experts and prosecutors. Prosecutors should review this information themselves to determine which communications, if any, are protected and which information should be disclosed under *Brady/Giglio*, Jencks, or Rule 16. If the circumstances warrant (for example, where review of a case file indicates that tests in another case or communications outside the case file may be relevant), prosecutors should request to review additional materials outside the case file. At the outset of a case, prosecutors should ensure that they and all forensic analysts involved are familiar with and follow the Deputy Attorney General's memorandum entitled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases": http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/dag_ecom.pdf.

Finally, when faced with questions about disclosure, prosecutors should consult with a supervisor, as the precise documents to disclose tend to evolve, based especially upon the practice of particular laboratories, the type and manner of documentation at the laboratory, and current rulings from the courts.

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From: [redacted]
Sent: Friday, December 1, 2017 2:39 PM
To: [redacted]
Cc: [redacted]
Subject: Proposed revision to Fed. R. Crim. P. 16 regarding expert disclosures

Dear Judge Molloy (Don) and Professor Beale:

As you may be aware, recently the Evidence Rules Advisory Committee held a symposium focusing on admissibility of forensic evidence, and the effectiveness of Daubert/Rule 702. I was privileged to have been invited to speak about challenges to effective application of the Daubert/702 test in criminal cases. I also was asked to contribute a short article on this topic to the Fordham Law Review, which is publishing articles related to the symposium.

With the permission of Professor Dan Capra (copied on this email) I am attaching my short article. It sets out my views regarding the challenges facing judges in applying Daubert/702 in criminal cases, and offers some modest suggestions how things might be improved. One improvement that would go a long way would be to amend Fed. R. Crim P. 16(a)(1)(G) & (b)(1)(C) to more closely parallel the far more robust expert disclosures required by the Federal Rules of Civil Procedure (Rule 26(a)(2)).

Thank you in advance for considering this issue, and please feel free to contact me if you have any questions.

Kind regards,

Paul Grimm

Challenges Facing Judges Regarding Expert Evidence in Criminal Cases

Paul W. Grimm[1]

Introduction

Ever since the Supreme Court decided the *Daubert* case,[2] the role of the trial judge in determining admissibility of expert testimony has become familiar. We are to be the "gatekeepers" standing between the parties (who naturally offer the most impressive experts whom they can find or afford, who are willing to advance their theory of the case) and the jury, who must come to grips with scientific, technical or other specialized information that usually is completely unfamiliar to them. This role is imposed by Fed. R. Evid. 104(a), which provides, in essence, that the trial judge must decide preliminary issues about the admissibility of evidence, the qualification of witnesses, and the existence of any privileges. When applying this rule with respect to experts, we further are informed by Fed. R. Evid. 702. As amended in 2000, to implement *Daubert*, it instructs that when scientific, technical or specialized knowledge would assist the finder of fact in understanding the evidence or making a fact determination, a witness qualified by virtue of knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise, provided (1) the testimony is sufficiently based on facts or data (2) any opinions expressed are the result of reliable principles or methodology, and (3) the witness reliably has applied the principles or methodology to the facts of the case. With regard to the reliability factors, *Daubert* and its progeny[3]identify a number of sub-

[1] United States District Judge, District of Maryland. The opinions in this article are mine alone.
[2] *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993).
[3] *General Electric v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

factors that a court may need to consider: whether the methodology has been tested; its error rate; whether it has been subject to peer review; whether it is generally accepted as reliable among practitioners of the relevant field of science or technology, and whether (if they exist) standard testing protocols have been followed.[4]

This sounds pretty straightforward until you take a minute to consider exactly what is involved. First, the acceptable subjects for expert testimony encompass science, technology, and any other type of specialized knowledge beyond the understanding of the typical jury. That covers a lot of territory. And if admissibility of expert testimony is conditioned on the notion that the jury needs help in understanding evidence beyond their familiarity, then why should it be assumed that the trial judge has any greater understanding than the jury? After all, most judges are generalists, and, if similar to me, do not regard themselves as specialists in science or technology, let alone the limitless types of "specialized" knowledge that may be relevant to a case (economics, accounting, business, finance, engineering, construction—the list is endless).

[4] The *Daubert* factors are: (1) whether the expert's technique or theory has been or can be tested; (2) whether the technique or theory has been peer reviewed; (3) whether there is a known or potential error rate associated with the application of the technique or theory; (4) whether there are established standards and controls governing the technique or theory that have been complied with; and (5) whether the technique or theory has been generally accepted as reliable in the relevant scientific or technical community. Advisory Committee Notes to 2000 Amendments to Fed. R. Evid. 702. The Advisory Committee Notes also recognize additional factors that a court may want to consider, such as: (1) whether the expert proposes to testify about facts derived from research independent of the litigation, as opposed to expressing opinions developed expressly for the litigation; (2) whether the expert unjustifiably extrapolated from an accepted to an unfounded conclusion; (3) whether the expert accounted for obvious alternative explanations; (4) whether the expert is being as careful in reaching his opinions as he would be when doing his regular professional work outside of the litigation context; and (5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert intends to offer at trial. *Id.*

Second, to do our jobs as required by Rule 702, we must find that the expert had sufficient facts or data on which to base her opinions, employed reliable principles or methodology, and then reliably applied the principles or methodology to the particular facts of the case. Well enough, but consider that trial judges are privy to very few of the underlying facts of a case (whether civil or criminal) before the trial. Indictments and civil pleadings are pretty sparse when it comes to factual particularity—that's what discovery is supposed to provide. But discovery requests and responses are not filed with the court, so by the time the case is ready for trial, all we know about the case is what we can glean from the filings that have been made before trial. These tend to focus on specific legal issues, rather than a panoramic view of the whole case. So how are we, the least informed about the underlying facts when compared to the knowledge of the parties, counsel and experts, to determine whether an expert considered sufficient facts or data?

And even if we were omniscient about the facts, what qualifies us to determine whether the principles or methodology employed by an expert (whose field we do know) is reliable, and reliably applied to the facts? When it comes to admissibility of expert evidence, many trial judges feel like they are in a battle of wits, unarmed.

The skeptical reader will scoff and say: "Stop feeling sorry for yourself; the information you need to determine admissibility of expert evidence is provided to you in the form of discovery disclosures required by Fed. R. Civ. P. 26(a)(2) and Fed. R. Crim. P. 16(a)(1)(G) and (b)(1)(C), and in motions *in limine* filed before trial challenging admissibility (or seeking advance rulings of admissibility) of expert testimony!" That's true, but only to a certain extent. First, the parties must have properly made their expert disclosures, and any judge will tell you that frequently they do not. Second, the issue of

expert admissibility must be raised sufficiently far in advance of trial for the judge to digest the information, hold a hearing, if needed, and make a considered ruling. That does not always happen, and it is not unusual to be confronted with an objection to expert testimony on the eve of trial, or during it.

Finally, with regard to criminal cases, the focus of this article, judges face significant challenges in ruling on admissibility of expert testimony that do not occur in most civil cases. I will start by describing these challenges, and then offer some suggestions about what can be done to address them.

Challenges to Making Good Expert Admissibility Rulings in Criminal Cases

1. The Right to a Speedy Trial

The Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." This right is implemented by the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* It provides, relevantly:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer . . . whichever date last occurs.

18 U.S.C. § 3161(c)(1). Now, there are lots of statutory exceptions to this seventy-day requirement,[5] and most criminal cases do not, in fact, get tried within seventy days, but the right to a speedy trial animates the entire pretrial process in a criminal case in ways that do not occur in civil cases. The clock is always ticking, and the judge is expected to expedite the proceedings. This means that everything that must be done, including

[5] Exceptions include, for example, delays resulting from competency examinations, interlocutory appeals, filing (and resolution) of pretrial motions, transfer of the defendant from one district to another, and consideration by the court of a proposed guilty plea. 18 U.S.C. § 3161(h).

making expert witness disclosures, must take place at an accelerated pace. And when the many pretrial proceedings of a criminal case are accomplished within a compressed time frame, this puts pressure on both counsel and the court to get it all done correctly within the available time. When we are in a hurry, we are not always as careful, complete or deliberate as we are when time is not an issue, and this can (and often does) apply to when, and how detailed, expert disclosures are. Every trial judge is familiar with expert disclosures that are pro forma, incomplete, and conclusory, and those that are do not provide the detail needed for the judge to conduct Rule 702 analysis properly.

2. The breadth of expert testimony introduced in criminal cases.

Everyone who has watched any of the myriad CSI shows on TV is familiar with the type of forensic evidence that can be offered into evidence in criminal cases: fingerprint analysis, ballistics and tool mark evidence; DNA testing, footprint and tire track evidence, hair and fiber analysis, bite mark evidence, and handwriting evidence, to name a few. But a recent informal poll I took of lawyers in the offices of the United States Attorney and Federal Public Defender in my district revealed the following types of expert evidence introduced in recent criminal cases: mental health (competency and sanity issues); other medical conditions; coded language used by drug dealers; characteristics of gang activity; terrorist activities; characteristics of sex trafficking, reliability (or unreliability) of eye-witness identification; linguistic analytics; bitcoin and other digital currencies; computer forensics; characteristics and operation of firearms and explosives; counterfeit currency; controlled substance analysis; the difference between personal use and distribution quantities of drugs; vulnerability of sex trafficking victims;

field sobriety testing in drunk driving cases; and operation of cell towers and other methods of locating individuals through tracking devices.

Think about all these types of potential experts in criminal cases. While doctors and psychologists may have standard methodology that they apply in reaching their decisions, what about gang experts, or sex trafficking experts, or coded language experts? Not likely that their methodology has been subject to peer review, or that there are handy error rates to consider, so how is the judge to assess the reliability of their methodology? Further, many experts who testify in criminal cases are from law enforcement agencies—government crime labs or criminal investigation agencies. How does the judge evaluate potential bias that may affect the reliability of law enforcement experts? The prevalence of "specialized" as opposed to "scientific" expert witness testimony in criminal cases presents unique challenges to a judge in determining admissibility.

3. The pressure on the defendant to plead, and plead quickly

There is tremendous pressure on a criminal defendant in federal court to plead guilty, and do so quickly. This comes from the influence exerted on sentencing by the Sentencing Guidelines of the United States Sentencing Commission. Even though, in the absence of a statutory requirement to impose a particular type of sentence in a criminal case (so called "mandatory minimum" cases), the Sentencing Guidelines are just that—guidelines, not mandatory rules—the judge is required to properly calculate the guidelines in each case, and consider them in imposing a particular sentence. And while the judge can depart (up or down) within the recommended guidelines sentence, or vary (up or down) to impose a sentence outside the guidelines range, it is reversible error not

to begin the sentencing with correctly calculating the guidelines range that applies.[6] For those not familiar with the esoterica of the Sentencing Guidelines, the ultimate guidelines range is a function of two factors: the numerical offense level applicable to the crime(s) that the defendant pled to or was convicted of; and the numerical calculation applicable to the defendant's criminal history. Offense levels range from 1 to 43, and criminal history levels from I to VI. The higher the combined offense and criminal history scores, the greater the recommended range of the sentence. And a two or three level reduction in offense level can make a huge difference in the recommended sentence, particularly at the high end of the guidelines scale.[7]

Defendants who plead guilty, thereby accepting responsibility, receive a two point reduction in offense level. U.S.S.G. § 3E1.1(a). If the unadjusted offense level is 16 or greater, and the defendant pleads guilty (thereby earning the two point reduction), he or she can earn a one point additional reduction in offense level (for a grand total of 3 points), if the government makes a motion at the time of sentencing, stating that "the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to plead guilty," which relieves the government from having to prepare for trial. U.S.S.G. § 3E1.1(b). So, the

[6] *United States v. McManus*, 734 F.3d 315, 318 (4th Cir. 2013) ("Although the sentencing guidelines are only advisory, improper calculation of a guideline range constitutes significant procedural error, making the sentence procedurally unreasonable and subject to being vacated." (quoting *United States v. Hargrove*, 701 F.3d 156, 161 (4th Cir. 2012)).

[7] For example, if a defendant has a guidelines score of offense level 33 and a criminal history score of III, his recommended sentence is 168-210 months. Drop the offense level by two points to 31, and the range is 135-168. Drop the offense level by three points, to 30, and the range is 121-151. These differences are significant, especially for the defendant who will be serving the sentence.

pressure on a defendant charged with a federal offense to plead guilty before the government has to invest a lot of time responding to pretrial motions and preparing for trial is intense, given the stakes at sentencing if the defendant goes to trial and is convicted, thereby becoming ineligible for any § 3E1.1 reduction.

This pressure plays out in the decision that a defense attorney has to make in providing effective representation to the defendant. Do you demand that the government make full disclosure of all the information relating to its expert witnesses, then challenge any that seem vulnerable by filing a motion to exclude their testimony (thereby jeopardizing the § 3E 1.1(b) reduction)? Or do you forego doing so to preserve the additional reduction in offense level and plead guilty promptly, thereby giving up in the process any chance of excluding expert testimony that may be critical to the government's ability to prove a charge? This is a tough position for a defense attorney and defendant to be in—guessing wrong can have serious consequences.

Since the vast majority of criminal cases in federal court are disposed of by plea, rather than trial (well above 90%, by most accounts[8]), the frequency with which the government's experts are challenged (thereby subjecting the sufficiency of their methodology and opinions to scrutiny by the court) is low. When experts grow accustomed to not being challenged, their perception of the need to fully document and justify their methodology and opinions can diminish. Similarly, when prosecutors are not often obliged to make timely, complete expert disclosures (and verifying before doing so that their experts have met the requirements of Rule 702), they too can become less

[8] *See* Emily Yoffe, Innocence is Irrelevant, *The Atlantic* (Sept. 2017), *available at* https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("Some 97 percent of federal felony convictions are the result of plea bargains").

vigilant in monitoring what their potential experts have done in a particular case to ensure that they base their opinions on sufficient facts, and employ reliable principles or methodology. And, when defense counsel infrequently demand full disclosure of information related to the government's experts (and even less frequently challenge admissibility), they undermine their ability to recognize deficient expert opinions, and their skill to challenge them effectively. And if any (or all) of these circumstances occur, then when the time comes that a challenge is made and the judge must hold a hearing, the underlying premise of *Daubert*[9] —that effective examination of the government expert by the defense attorney will help the trial judge properly exercise her gatekeeping responsibility by exposing shortcomings in the witnesses' opinions—may be compromised by insufficiently detailed information to assess reliability, and insufficient skill by counsel to develop the facts and arguments to clarify the issues that the judge must decide.

4. *Difficulties faced by defense counsel in obtaining defense experts to challenge government experts*

In the vast majority of federal criminal cases, defendants are represented by either federal public defenders or private counsel appointed pursuant to the Criminal Justice Act ("CJA").[10] While public defenders may have resources to locate and hire experts in criminal cases without the approval or assistance of the court, few CJA attorneys have the financial ability to hire defense experts without requesting advance approval from the

[9] In *Daubert*, the court noted that "[v]igouous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596 (quoting *Rock v. Arkansas*, 483 U.S. 44, 66 (1987)). Inexperienced counsel lacking access to qualified defense experts are not well suited to "vigorously" cross examining government experts.

[10] 18 U.S.C. § 3006A.

presiding trial judge (without which CJA funds are not available to pay the expert). That means that in many criminal cases, the defense attorney must file a motion with the court to request authorization to hire an expert witness, and justify the need to do so—something the government is never obligated to do.

Further, as already noted, many of the experts called by the government in a criminal case are involved in the investigation of criminal cases, or work for government crime labs. That means that prosecutors frequently work with their experts throughout the investigation of the case, becoming familiar with what they have done long before charges ever are filed. In contrast, once their clients has been indicted, and the speedy-trial clock has begun, defense counsel have much less time to decide whether to seek a defense expert. And they cannot even begin to make that decision until after they request, and receive, expert disclosures from the government. Unlike Fed. R. Civ. P. 26(a)(2), which requires that in civil cases any party that intends to introduce expert testimony must make proper disclosure of the opinions (and supporting basis) their experts will make "at least 90 days before the date set for trial or for the case to be ready for trial [unless otherwise ordered by the court]," Fed. R. Crim. P. 16(a)(1)(G) does not require mandatory disclosure of the government's experts and their opinions; the defense must request it. And if the defense does request it, Rule 16 does not impose a deadline by which the government must make its disclosure. So, unless the trial judge sets a date for expert disclosures (and not all do), the defense must make its request and wait for the prosecution to make its disclosure. Not all prosecutors do so promptly upon request, and it is not an infrequent occurrence for defense counsel to receive government expert

disclosures so close to the trial date that it poses real problems for the defendant to have enough time to locate (and get court approval for) a defense expert.

Compounding this difficulty, when defense attorneys do decide to retain a defense expert, they may have difficulty finding one because many of the experts needed in criminal cases come from law enforcement. Unless the defense attorney can find a retired or former government investigator, they are not going to be able to locate one from the ranks of currently employed law enforcement investigators. As noted in the Federal Judicial Center's *Reference Manual on Scientific Evidence*, "adversarial testing [of expert testimony in criminal cases] presupposes advance notice of the content of the expert's testimony and access to comparable expertise to evaluate that testimony."[11] Just how effectively can the defendant in a criminal case challenge the government's expert testimony without access to a comparable defense expert to review the work done by the government's expert and critique any factual insufficiencies or methodological shortcomings? And without informed and skilled challenge by the defense, how is the trial judge to perform his gatekeeping duty and make the findings required by Rule 702 and *Daubert* when deciding objections to government experts?

5. Insufficiently detailed disclosure of expert opinions under the criminal procedure rules

[11] Reference Manual on Scientific Evidence 124 (3d ed. Fed. Judicial Ctr. 2011); *see also* Advisory Committee Note to Fed. R. Crim. 16 (1993 Amendment) ("[Rule 16's expert disclosure provision] is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.").

As noted, Fed. R. Crim. P. 16(a)(1)(G) imposes an obligation on the government[12] to disclose expert testimony it intends to introduce at trial. It states:

> At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial . . . . The summary provided under this subparagraph must describe the witness's opinions and the bases and reasons for those opinions, and the witness's qualifications.

At first glance, this seems pretty reasonable. But contrast the disclosure requirement in Rule 16(a)(1)(G) with its counterpart in the Rules of Civil Procedure, Rule 26(a)(2)(A) and (B):

> [A] party must disclose to the other parties the identify of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705 . . . . Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

Which disclosure would you rather have if you had to prepare to challenge the testimony of an adversary's expert? The answer is obvious. The disclosure requirement in the civil rules is significantly more robust. It requires that the expert *sign* a written report. This prevents an expert from distancing herself from vagueness, incompleteness or inaccuracy in the report by attributing its contents to an attorney who drafted it (as usually is the case for most discovery disclosures and responses in civil and criminal

[12] A reciprocal obligation is imposed on the defense. Fed. R. Crim. P. 16(b)(1)(C).

cases), rather than the expert. It must contain a *complete* statement of *all* opinions that will be given at trial, and the *basis* and *reasons* for them. This allows the cross-examining attorney to prevent the expert from adding at trial opinions or supporting facts not found in the written report, the abusive practice of "testifying beyond the report." It also prevents the expert from offering conclusions only—without the supporting reasons and bases underlying them. The report also must contain the facts or data *considered* by the expert (not just the facts that the expert intends to rely upon), as well as any exhibits that will be used to summarize or support the expert's trial testimony. This prevents an expert from "cherry-picking" favorable facts to support his opinions without disclosing unfavorable ones which, when known, can show that the opinion is not well founded.

To even a casual observer, the expert disclosures required by the rules of civil procedure are far more robust, detailed and helpful to the recipient than those required by the criminal procedure rules. Further, in civil cases, the parties also can take the deposition of an opposing expert (and usually do), which affords the opportunity to further flesh out the expert's opinions, methodology and supporting factual basis. If lawyers in civil cases then challenge admissibility of an expert's opinion, they have substantially more information to support their challenge than criminal lawyers do, because depositions of experts are unavailable in criminal cases. In contrast to the comprehensive disclosures in civil cases, in criminal cases, most of the expert disclosures I have seen (and remember that the trial judge does not see the disclosure unless there is a challenge, because the disclosure only is served on the defense attorney, not docketed on the court record) were cursory as well as conclusory, and not particularly useful for cross-

examining the expert or challenging her testimony. And they certainly were insufficient to be of much help to me in making a ruling on admissibility of the expert's opinions.

Recently, the Department of Justice has provided supplemental guidance to prosecutors regarding the disclosure of forensic evidence and experts.[13] Commendably, it emphasizes that "prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them."[14] And, it clarifies that there are three distinct disclosure obligations that the criminal rules impose on prosecutors that relate to forensic evidence: (1) Rule 16(a)(1)(F) (the duty to turn over the results or reports of any scientific test or experiment); (2) Rule 16(a)(1)(G) (the duty to provide a written summary of expert testimony the government intends to use at trial); and (3) Rule 16(a)(1)(E) (more broadly requiring production of documents and items material to preparing the defense).[15] Helpfully, the DOJ Supplemental Guidance stresses that these disclosure obligations (augmented by others that may be required by the Jencks Act,[16] or the *Brady*[17]and *Giglio*[18] decisions) "are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds."[19]

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[13] Memorandum from Sally Q. Yates, Deputy Attorney General, to Department Prosecutors, *Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts*, January 5, 2017, available at justice.gov/archives/ncfs/page/file/93o411/download (hereinafter "DOJ Supplemental Guidance").
[14] DOJ Supplemental Guidance 1.
[15] *Id.*
[16] 18 U.S.C. § 3500.
[17] *Brady v. Maryland*, 373 U.S. 83 (1963).
[18] *Giglio v. United States*, 405 U.S. 150 (1972).
[19] *Id.*

In addition, the DOJ Supplemental Guidance recommends that DOJ prosecutors obtain the forensic examiner's laboratory report and turn it over to the defense if requested; that the written summary required by Rule 16(a)(1)(G) should "summarize the analyses performed by the forensic expert and describe any conclusions reached" and should "be sufficient to explain the basis and reasons for the expert's expected testimony."[20] Further, prosecutors are encouraged to provide the defense with " a copy of, or access to, the laboratory of forensic expert's 'case file,'" which "normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report.[21]"

The DOJ Supplemental Guidance, if it continues as DOJ policy, and to the extent that line prosecutors adhere to it, will go a long way to bolster the anemic disclosure requirements currently found in Rule 16(a)(1)(G). But the effectiveness of the DOJ Supplemental Guidance is muted by its narrow application to forensic evidence and expert reports, as opposed to the many other types of expert testimony (referenced above) that are common to criminal prosecutions.

Suggestions for Trial Judges

So, what's a trial judge to do to overcome the challenges discussed above when called on to make rulings regarding the admissibility of expert testimony in criminal cases? The starting point is to have firmly in mind the two things that a judge must have in order to make proper rulings: (1) the underlying facts related to the challenged evidence; and (2) sufficient time to digest the facts, and make a principled ruling.

[20] *Id.* at 2.
[21] *Id.* at 3.

Fortunately, judges have the inherent authority to ensure that they get what they need to do the job.

1. Address disclosure of expert opinions early in the case

Fed. R. Crim. P. 17.1 states: "On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any maters agreed to during the conference." This rule allows a judge to schedule a preliminary pretrial conference early—right after the defendant has been arraigned. At that time, the court can discuss the case in general, get details from the attorneys about the status of discovery, set deadlines for getting discovery done, and inquire about likely expert testimony. While the government might take the position that it is too early to have made firm decisions about trial experts, a judge must be prepared to take this with a grain of salt. After all, the prosecutor has supervised the investigation and charging of the defendant, and that includes presenting witnesses to the grand jury. It takes an inexperienced (or disingenuous) prosecutor to claim that he has no idea during the early stage of a case about what kind of expert testimony may be offered. The goal is not to lock them in too early, but to raise the issue so that the court can set a reasonable schedule for when expert disclosures will be made, motions *in limine* challenging experts filed, and a hearing (if needed) scheduled sufficiently far in advance of trial so that the judge has adequate time to make a thoughtful ruling.

2. Make your expectations about expert disclosures clearly know at the outset

Judges should feel free to let counsel for the government and defendant know at the start of the case that they will insist on compliance with both the letter and spirit of

what Rule 16 requires for expert disclosures. While the shortcomings of Rule 16 itself have been discussed above, the judge can get valuable assistance from the advisory committee notes that supplement the rule. For example, the advisory committee notes to the 1993 amendments to Rule 16 are especially helpful. The following are a sampling of the useful guidance they afford:

a. *The amendment [to Rule 16] is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances and provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.*

When combined with the language of Rule 17.1, this supports the judge's ability to build into the pretrial schedule reasonable deadlines (reached after consulting with counsel) for making expert disclosures, filing motions *in limine*, and scheduling an evidentiary hearing if needed. It further underscores the ability of a judge to advise the lawyers for both the government and the defendant that it will insist that the exert disclosures be detailed, meaningful, complete, and not boilerplate or conclusory. Otherwise, they will be useless to minimize the risk of surprise and continuance requests. And boilerplate expert disclosures do not provide a fair opportunity to test the expert's opinions or effectively cross-examine.

b. *With the increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. . . . This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702.*

This advisory note language is important because so many experts in criminal trials testify to non-scientific matters (fingerprint analysis, bite mark analysis, tool mark evidence, ballistic evidence). The Rule 16 disclosures need to be detailed enough so that

these kinds of non-scientific opinion testimony (for which there may not be peer review literature, known testing procedures, established error rates, or standard testing protocols) can be explored by counsel and brought to the attention of the court when ruling on any challenge to the evidence.

c. *[T]he requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.*

It is clear that in order for the Rule 16 disclosure to fulfill this purpose, it must be detailed, not boilerplate, and set forth each discrete opinion the expert is expected to give, as well as the factual basis supporting it. The judge should make it clear to counsel that this level of detail is required. This can be enforced by ordering that expert disclosures also be filed with the court by a specific date, and then holding a status conference (in person or by telephone) once they have been provided to discuss whether the disclosures are sufficiently detailed. If not, the court can order that they be supplemented.

d. [Rule 16] requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under federal Rule of Evidence 703, including opinions of other experts.

Once again, this advisory note language underscores the obligation to include detailed information, not conclusory boilerplate, in expert disclosures. Judges who make sure the attorneys know this early in the case are more likely to see substantive disclosures, which will fulfill the purpose of the disclosure rule, and make it easier for the judge to make admissibility rulings.

3. Know where to look for helpful information to give you the background needed to rule on admissibility of expert testimony.

If the Rule 16 expert disclosures and the briefing by counsel on a motion to exclude (or admit) expert testimony in a criminal trial do not provide the judge with enough information to fulfill her gatekeeping role under *Daubert* and Rule 702, where can the judge turn to find publicly available information to feel better prepared to rule? Fortunately, there are many reference materials that are available. I will highlight three.

One of the best is the Reference Manual on Scientific Evidence (Third Edition) prepared by the Federal Judicial Center and the National Research Council.[22] It contains an excellent discussion of the legal standards for admissibility of expert testimony, a discussion of how science works, as well as reference guides on: forensic identification; DNA identification evidence; statistics; multiple regression, survey research, estimation of economic damages, epidemiology, toxicology, medical testimony, neuroscience, mental health evidence, and engineering. Each reference guide is written to be understandable to lay readers, comprehensive enough to give the reader a real feel for the issues associated with the discipline discussed, and yet not so long that they cannot be read in a reasonably short period of time. Each contains references to other helpful materials that may be consulted for more information.

Because forensic evidence is prevalent in criminal cases, two reports on this subject may be very helpful. The most recent is the September, 2016 Report to the President from the President's Council of Advisors on Science and Technology ("PCAST") titled "*Forensic Science in Criminal Courts: Ensuring Scientific Validity of*

[22] Reference Manual on Scientific Evidence (3d ed., Fed. Judicial Ctr. & Nat'l Research Council 2011).

Feature-Comparison Methods."[23] The PCAST Forensic Evidence Report contains thorough discussions regarding the following forensic feature-comparison methodologies: DNA analysis (single source samples, simple-mixture source samples, and complex-mixture source samples); bitemark analysis; latent fingerprint analysis; firearms analysis; footwear analysis; and hair analysis.

The second is the National Research Council's February, 2009 Report titled *"Strengthening Forensic Science in the United States, A Path Forward."*[24] In addition to a useful discussion about what forensic science is and the legal standards for admitting forensic evidence in court cases, it contains helpfully detailed discussions about the following forensic science disciplines: biological evidence; analysis of controlled substances; friction ridge analysis; shoeprint and tire track analysis; toolmark and firearms identification; hair evidence analysis; fiber evidence analysis's questioned document examination; paint and coatings analysis; explosives and fire debris evidence; forensic odontology; bloodstain pattern analysis; and digital and multimedia analysis.

These three references are especially helpful to judges faced with ruling on admissibility of expert evidence in criminal trials. They provide sufficient background information to allow a judge to understand the critical evidentiary issues with various types of recurring expert evidence in criminal cases. When combined with research on court decisions discussing admissibility of expert evidence in criminal cases, a judge can feel well prepared to make a ruling, even if the Rule 16 disclosures and filings of the parties are insufficient in themselves to enable the judge to rule.

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[23] Available at https://obamawhitehousearchives.gov/sites/default/files/microsites/ostp/pcast/pcast_forensic_science_report_final.pdf.

[24] Available at https://www.ncjrs.gov/pdffiles1/nj/grants/228091.pdf.

4. Recommended Amendment to Fed. R. Crim. P. 16

The final suggestion as to what could make life easier for trial judges and counsel alike, is a recommendation that the Criminal Rules Advisory Committee consider amending Rule 16 to enhance the Rule 16(a)(1)(G) and (b)(1)(C) expert disclosures. Specifically, the Committee should consider whether they should be made to more closely resemble the disclosures required in civil cases by Fed. R. Civ. P. 26(a)(2). At a minimum, Rule 16 disclosures should include: (1) a complete statement of each opinion the expert will testify to, as well as the basis and reasons supporting them; (2) a summary of the facts or data considered (not just relied on) by the witness in forming his or her opinions; and (3) a description of the witness's qualifications. In addition, while less important, it would also bolster Rule 16 if the disclosures included a list of cases in the past 4 years where the witness had testified (allowing counsel to read the prior testimony), and a copy of any exhibits that will be used by the expert in support of his or her testimony.

Conclusion

Determining the admissibility of expert testimony can be a challenge to trial judges under the best of circumstances. But in criminal cases, there are additional challenges the judge faces in doing so. Understanding what these challenges are and how best to meet them can make life much easier for the judge. In addition, fortifying Fed. R. Crim. P. 16's expert disclosure requirements to make them more like the more helpful ones found at Fed. R. Civ. P. 26(a)(2) would also greatly improve things.

TAB 6

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TAB 6A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Suggestion 17-CR-E (Joni Albanese) & Suggestion 18-CR-A (Aaron Ahern)

DATE: March 14, 2018

The Committee received two suggestions for amendments. It appears that both fall outside the Committee's jurisdiction.

Suggestion 17-CR-E (Joni Albanese). Ms. Albanese expresses concern about the variation in the laws from state to state (and even town to town), and she urges the creation of a Uniform Criminal Procedure Code that would parallel the Uniform Commercial Code. She also describes her own experience, and expresses a variety of concerns about the fairness and reliability of the criminal justice system.

The suggestion for uniform rules governing both federal and state cases falls beyond the Committee's authority under the Rules Enabling Act, 28 U.S.C. § 2072(a), which allows the Supreme Court "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts."

Suggestion 18-CR-A (Aaron Ahern). Mr. Ahern seeks a procedure that would allow small businesses "to collect restitution for damages lost after the reliance of a misrepresentation that was submitted in response to a business concern." He writes that some small businesses are still having difficulty in recovering what they are entitled to receive after two years of extreme shock.

It is unclear whether state or federal cases are Mr. Ahern's principal concern. Assuming he is concerned with federal criminal cases, his request still lies beyond the Committee's jurisdiction. As noted, the Rules Enabling Act, 28 U.S.C. § 2072(a), authorizes only the promulgations of "general rules of practice and procedure and rules of evidence." Only Congress has the authority to create new remedies or change the penalties for federal criminal offenses in order to provide for restitution where it is not currently available.

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First Name: joni
Last Name: albanese
Mailing Address: 163 sherman hill rd
Mailing Address 2:
City: Afton
Country: United States
State or Province: New York
ZIP/Postal Code: 13730
Received Date: 12/16/2017

Comment: I feel that there is a major need for reform in Criminal Procedure Laws in the United States. I myself feel that there should be a Uniforn Criminal Procedure Law, much like the Uniform Commercial Code, ALL OF WHICH IS GOVERNED BY AND AS, THE FEDERAL RULES OF CRIMINAL PROCEDURE. THERE IS WAY TO MUCH VARIANCE IN THE WAYS DIFFERENT STATES, EVEN DIFFERENT tOWNS AND cOUNTIES WITHIN THE STATES APPLY THE LAW AND RULES, Comprehension and understanding between people varies signifigantly. Here in new York, there can be no due process when the rules are so flagrantly disregarded, by the judges as well as the attorneys. WHY , WHY, WHY, must a persons defence become nothing more than a game of chess, who moves first best best positioning in the game.WHY must a defendant have to beg and barter before the prosecutor will hand over the evidence against a defendant, many times hiding the facts. Is this not the justice system, A hearing is to set out to find the truth, the facts of the case. IF EVERYONE just stuck to facts of the natter, the truth can more readily be had. The prosecutor is out for one thing, a conviction. and most of the time the trth is the last thing on his/her mind. They want to win at all costs. TRUTH AND FACTS BE DAMNED, AND THAT IS THE TRUTH. YOU HAVE JUDGES AND DISTRICT ATTORNEYS WHO DISTORT THE RULES THEY SEE FIT, NOT AS THEY ARE WRITTEN. i am right now doing research on a criminal matter here in Chenango County NY. If this is not a clear case of the need for a UniformCriminal Code, I don't know what is.The UCPC is needed,, UNIFORM CRIMINAL PROCEDURE CODE. That is how the US Constitution can and will offer Equal Protection of the Laws and Due Process. WHY does it have to come down to referendums and such hesitation to fix a system that is obviously broken. The Judges and Attorneys should be leading the way to positive change. What I have seen proposed in the federal repeal is a giant step in thee right direction, 14 days to start the discovery is one GIANT STEP in the right direction. Here in Chenango County, you can sit months in jail, waiting to hear from your court appointed attorney, WHY, they are scared of

the judges , so they go with the flow, and do as the judge wants. To request discovery is like a foreign topic, and if you do contest what they say are the facts of your case, you are threatened more jail time and if you have court appointed attorney, you will not get discovery. They say the agffidavit in support of search warrant is non discoverable new York and the US. You do as much research as possible. ANOTHER totally sad commentary to what is known as the JUSTICE SYSTEM, one that many claim to be the best in the world, is packed with a Judiciary Branch of our government full of corruption and self serving "professionals". IN about every law book I have read, including American Jurisprudence, Am Law Review, New York Jurisprudence, I subscribed to Westlaw looking for help, and in every instance the word TESTILY is like the word of the day. It has become an epidemic in our legal system, US SUPREME COURT has stated that it is an expected well known fact that Police lie on their search warrant affidavits, they lie to Grand Jury, they lie if called as witness, all the while the judges, District attorneys are giving a wink and a nod of acceptance. WHY IS THIS ACCEPTABLE. HOW CAN WE EVEN CA:LL THIS A JUSTICE SYSTEM. The supreme court says its our subculture. now I understand why the Judges allow the application and sworn affidavits for search warrants to get sealed, , it is not the CI who they are protecting. In one case in Greene NY, the police not only made up a search warrant, they invented the judge to go with it. The defendant was convicted, so obviously the police lied to the county court judges and DA(or did they) It was the appellate court that discovered the fraud on the court and the people. an isolated incident? I think not. Hearsay evidence is a very slippery slope, I think you addressed it in a meaningful manner. I salute your effortds in clarifying the matter of the reply and the may file , to me it was clear, but as i said earlier, comprehension skills are so very different for so many people. The case I am researching now involves a CI that the judge deemed a reliable source, he spent 18 years in prison, recently was arrested with methamphetamine manufacture items, he assaulted me with loaded shotgun twice same day, ran my dog over, hit me head on in vehicle shoving my car backward 3-400 yards into roadway, told me he was going to kill me, but police district attorney chose not to prosecute him, they used him for reliable confidental informant against my son, and the very ones who knew what he did, AUTHORIZED AND PAID HIM TO COME BACK ON MY PROPERTY only to be threatened with deadly force , red dots of scopes circling my head with threats of death to my dog, in my yard, by the New York State Police. Troop C, KNOWN TO TESTALY

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18-CR-A

Comment: ID:USC-RULES-CR-2017-0004-0001 Please allow small business the opportunity to collect restitution for damages lost after the reliance of a misrepresentation that was submitted in response to a business concern. Victims of Gross Negelegent Domestic violence should not be told there claim is to High for the us economy, and if they relied on the misrepresentation they must have a opportunity to collect restitution. Please help small business in crisis recover what they were rightfully entitled to receive. After two years of extreme shock some small business is still having difficulty dealing with the crisis caused by violence and misrepresentation. In good faith Aaron Ahern

First Name: Aaron
Last Name: Ahern
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State or Province: Oregon
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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 16 – Work Product (Suggestion 18-CR-B)

DATE: March 19, 2018

Michael Blasie has written to draw the Committee's attention "to an issue with the codified work product rule, Rule 16," and particularly "the unclear relationship between the Rule and Supreme Court precedent." Blasie urges the Committee to consider the following questions:

> (1) should Rule 16 parallel the language of Civil Rule 26(b)(3); (2) should the scope of criminal work product protection be the same, broader, or narrower than the scope of civil work product protection. Whatever the answers, [Blasie] suggest[s] Rule 16 should codify the entire scope of work product protection. And the Committee should consider adding a note addressing the precedential value, and the federal court's use, of *Hickman*. Is *Hickman* still good law?

The question before the Committee is whether to appoint a subcommittee to under take an in-depth review of Mr. Blasie's suggestion.

Mr. Blasie's suggestion is based on his article, *The Uncertain Foundation of Work Product*, 67 DEPAUL L. REV. 35 (2017), which urges a reassessment that would extend beyond the Criminal Rules, and beyond the discovery stage. His article concludes (*id.* at 76):

> Perhaps the best course is for the Judicial Conference to re-examine the codified rules, which have remained largely unchanged since their inception. The Conference should consider whether the rules should align with one another, and whether the rules should match or exceed the scope of *Hickman*. The Conference should also consider whether there is a need for codified rules about work product protection outside the discovery context.

Since Mr. Blasie's proposal is applicable to all of the federal rules that deal with work product, we reached out to the reporters for the Civil Rules and Evidence Rules Committees. Neither sees a pressing need for a cross-rules project to "codify the entire scope of the work product protection" at this time.

We agree with that conclusion. In Mr. Blasie's view, this problem has been present since the time of the Court's opinion in *Hickman v. Taylor* and the promulgation of Rule 16 and Civil Rule 26. There is no indication that the system requires a fundamental reset. Mr. Blasie's suggestion (including his article) is included at Tab B.

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Michael Blasie
1201 Galapago Street, #93
Denver, CO 80204
mblasie@gmail.com
201-669-2524

March 10, 2018

The Honorable Donald W. Molloy
United States District Court Judge
U.S. District Court for the District of Montana
Russell Smith Courthouse
201 E. Broadway, Suite 360
Missoula, MT 59802

Judge Molloy:

I am a lawyer practicing in Denver, Colorado, writing to draw your and the Committee on Criminal Rules' attention to an issue with the codified work product rule, Rule 16. My concern is the unclear relationship between the Rule and Supreme Court precedent. If unaddressed, ambiguity risks permitting discovery of material the Committee wants protected, and risks federal courts rendering decisions on questionable bases.

Attached is an article I recently published outlining the backstory to this concern. Here is the essence. The Supreme Court created the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947). After *Hickman's* language proved unworkable, the Court codified work product protection in Civil Rule 26 and Criminal Rule 16. But neither rule tracks *Hickman's* language. Civil Rule 26 is similar to *Hickman*, but Rule 16 mirrors neither the civil rule nor *Hickman*. Currently, when either rule does not provide protection federal courts look to *Hickman*. That is a problem. Because *Hickman* is not a constitutional ruling and because the Rule issued after *Hickman*, arguably Rule 16 supersedes *Hickman*, at least in part. It is unclear under what authority a federal court can supplement or modify a rule.

In light of this concern, I recommend the Committee consider the following questions: (1) should Rule 16 parallel the language of Civil Rule 26(b)(3); (2) should the scope of criminal work product protection be the same, broader, or narrower than the scope of civil work product protection. Whatever the answers, I suggest Rule 16 should codify the entire scope of criminal work product protection. And the Committee should consider adding a note addressing the precedential value, and federal court's use, of *Hickman*. Is *Hickman* still good law?

Thank you for your consideration. If the Committee has any questions or wishes to discuss this issue, I am anxious and happy to help.

Sincerely,

Michael A. Blasie

DePaul Law Review

Volume 67
Issue 1 *Fall 2017*

Article 3

The Uncertain Foundation of Work Product

Michael A. Blaise

THE UNCERTAIN FOUNDATION OF WORK PRODUCT

Michael A. Blasie[1]

Introduction

Work product is a cornerstone of legal practice. Alongside the attorney-client privilege it forms the great bulwarks protecting attorney efforts from an adversary. Its significance pervades all litigation phases, from discovery to trial preparation. Yet how to classify the doctrine is elusive; it has overtones with discovery, procedural, evidentiary, and privilege issues.

But the true dilemma stems much deeper. Overlooked by scholars, practitioners, and courts alike are two crucial and fundamental issues: the basis for the doctrine and its proper scope. This Article documents the bizarre, untold origin story of this pivotal doctrine. The story takes us from the Supreme Court's invention of the doctrine, through its uncertain foundations, to its present, vital role in legal practice. On this journey, this Article identifies previously ignored assumptions that form the very roots of work product.

Work product originated in the seminal 1947 Supreme Court decision of *Hickman v. Taylor*.[2] But its birth was hardly traditional. While earlier cases disputed the concept, the phrase "work product" originated at oral argument before the Third Circuit.[3] After the Third Circuit's decision, the Supreme Court took a rare step; it rejected a proposed codified work product rule, granted *certiorari*, and decided *Hickman* on public policy grounds.[4]

The doctrine's growth post-*Hickman* is even more unusual. Several decades after *Hickman*, amendments to the Federal Rules of Civil and Criminal Procedure codified work product rules.[5] But these codified

1. Michael Blasie is a graduate of the New York University School of Law and litigator in Colorado who currently serves as law clerk to The Honorable David Richman of the Colorado Court of Appeals. Special thanks to Professor Arthur R. Miller for his advice on this Article and for being a dedicated teacher and mentor who instilled a love of procedure. Also thanks to Professor Gabriel Rauterberg for his unquenchable wisdom, patience, enthusiasm, and friendship.

2. Hickman v. Taylor, 329 U.S. 495, 496 (1947).

3. Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945).

4. *See infra* notes 84–99 and accompanying text.

5. *See infra* notes 150–160 and accompanying text.

versions did not mirror the language of *Hickman*. On the contrary, they diverged significantly. No one knows why. Stranger still is how courts reacted to this conflict. Instinctively, one would think the Rules preempt *Hickman*. Yet consistently federal courts have held the opposite. Like a Venn diagram, there is dual authority such that materials are protected either by a Federal Rule, *Hickman*, or both.[6]

Three essential questions arise. First, what is the basis of *Hickman v. Taylor*? Was the Supreme Court interpreting the Federal Rules, filling a gap in the Rules, creating a common law doctrine broader than the Rules, or doing something else? The classification informs whether *Hickman* endures after the passage of the codified Rules. Second, under what authority can federal courts expand a doctrine beyond the limits of a Federal Rule? By keeping *Hickman* alive, courts produced a unique doctrine that pulls from two very different sources of authority that define the doctrine differently. Third, given the answers to the preceding questions, is *Hickman v. Taylor* still binding law?

This Article answers these questions by tracking and interpreting the history of work product. Part II outlines its birth and evolution beginning with the history and events leading to *Hickman v. Taylor*. In doing so, it describes the unusual setting that primed the decision. What becomes clear is that work product arose shortly after the United States switched to a discovery-based civil justice system. Some courts obeyed the strict contours of the then recently released Federal Rules of Civil Procedure; others pursued a gut reaction to protect the attorney-client relationship. Then, in *Hickman*, the Supreme Court created the doctrine based on public policy. Work product emerged as an intensely practical doctrine that protects attorney work, but yields to an adversary's need to discover essential facts. The Article continues by describing the evolution of the doctrine post-*Hickman*, including reactions to the case, the creation of codified work product rules, and how federal courts treated *Hickman* in light of these rules.

Part III draws upon the history of work product and the Supreme Court's post-*Hickman* decisions to answer the three questions presented above. It concludes work product is not one doctrine, but two: the *Hickman* work product doctrine and the codified work product doctrine. More specifically, (i) the *Hickman* work product doctrine is still good law and is, at least in part, more expansive than the codified work product doctrine; (ii) federal courts can apply the *Hickman* doctrine beyond the scope of codified work product rules

6. *See infra* notes 174–185 and accompanying text.

through an exercise of inherent power; and (iii) the codified work product doctrine preempts the *Hickman* work product doctrine when the two conflict.

Work product is about much more than the balance between a productive attorney-client relationship and the need to discover relevant material. Rather, it is about *who* strikes this balance. The animating principle behind these conclusions is that work product is subject to complete legislative control. While the judiciary invented the doctrine, the legislature controls our judicial system. From the number of federal courts, to the procedural and substantive rules of the civil justice system, all are subject to legislative control. There is a realm Congress cannot control, but work product is not in it.

II. The Birth and Evolution of Work Product

The switch to a discovery-based system maximized parties' ability to gain knowledge of the issues and facts before trial.[7] But courts quickly developed limits on this ability; the work product doctrine being one.[8] It is a practical doctrine that recognizes attorneys serve both the advancement of justice and the interests of their clients.[9] It protects from disclosure an attorney's case preparation materials, like research memoranda and witness interviews.[10] But its protection is not absolute.

"The central justification for the work product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role. Any invasion of this privacy could distort or modify the attorney's function to the detriment of the adversary system."[11] An additional rationale "emphasizes the need to protect the privacy of the attorney's mental processes."[12]

Work product consists of several principles. First, information regarding facts and witness statements are not protected by the attorney-client privilege.[13] Second, the need to protect a lawyer's files from discovery is important to the justice system but does not make the files absolutely immune from discovery.[14] Third, the party seeking

7. Hickman v. Taylor, 329 U.S. 495, 501 (1947).
8. *Id.* at 507–08.
9. *Id.* at 510.
10. *Id.* at 511.
11. Jeff A. Anderson, Gina E. Cadieux, George Hays E., and Michael B. Hingerty, *Work Product Doctrine*, 68 Cornell L. Rev. 760, 784–85 (1983).
12. *Id.*
13. 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure: Civil § 2022 (3d ed. 2010).
14. *Id.*

disclosure bears the burden of showing special circumstances warrant disclosure.[15] Fourth, when the moving party can obtain the desired information elsewhere, it is not a special circumstance.[16] Though work product covers both attorney and non-attorney case preparation, work revealing the mental processes and opinions of attorneys is particularly sacrosanct.[17]

The uniqueness and complexity of work product cannot be understated. As Professor Clermont observed:

> Work product is the legal doctrine that central casting would send over. First, it boasts profundities, arising as it does from the colliding thrusts of our discovery and trial processes and from conflicting currents in our modified adversary system. Second, it will surface frequently, because the protected materials are commonly created by each side but uncommonly useful to the opponent. Third, it has generated a small mountain of lower-court case law, with the foothills forming a labyrinth of rules and wrinkles. In short, work product has for a couple of generations dramatically bewitched academics, bothered practitioners, and bewildered students.[18]

Often overlooked, however, is the history of work product. Tracking its origins and evolution explains why the Supreme Court created it and how work product has changed. This history also reveals the questionable assumptions modern courts, practitioners, and scholars rely upon.

*A. The Pre-*Hickman *Universe*

The pre-*Hickman* landscape was almost primordial. It was a time of galactic change and uncertainty. Most notably the federal system had recently switched from a minimalist discovery process to a liberal one, and the first version of the Federal Rules of Civil Procedure had just issued. *Hickman* raised an issue on the minds of many. But it was an issue that had no name, no doctrine, no rule on point, and no appellate authority. Into this morass, the Supreme Court dove headfirst.

Pre-1938 discovery and civil procedure is virtually unrecognizable to the modern era. There were no comprehensive federal civil rules.[19] Discovery was intensely limited.[20] The "sporting" theory of justice

15. *Id.*

16. *Id.*

17. United States v. Nobles, 422 U.S. 225, 238 (1975).

18. Kevin Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 758, 775 (1983).

19. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698–701 (1998).

20. William A. Morrow, Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1147–48 (1971). *See also* 8 WRIGHT & MILLER, *supra* note 13, § 2001.

ruled and "a judicial proceeding was a battle of wits rather than a search for the truth, each side was protected to a large extent against disclosure of its case."[21] There was very little document discovery and limited depositions.[22] Indeed, depositions "were intended only for the preservation of proof; any discovery that resulted was only accidental and incidental."[23] Federal courts had limited discretionary power to authorize greater discovery and rarely exercised such power.[24] Unsurprisingly, there was no discussion of protecting attorney trial preparation materials. "Because his client's case was largely immune from discovery in American courts prior to the Federal Rules, an attorney had no need for a protective doctrine either at law or in equity."[25]

Beginning in the early 1900s some practitioners began advocating for uniform federal rules of civil procedure.[26] Although an act required federal courts to apply the procedure of the state in which they sat, this at times conflicted with federal procedural statutes and practices thereby causing costly confusion and difficulty predicting procedure.[27] There was also significant criticism of the often non-codified state court procedure, and a belief that uniform federal rules could provide a model for states to adopt.[28]

Finally, the movement succeeded with the 1934 passage of the Rules Enabling Act, which permitted the Supreme Court to create uniform rules for federal courts.[29] In 1938 the first Federal Rules of Civil Procedure (FRCP) issued.[30] The FRCP merged law and equity, simplified pleadings, and eliminated many restraints on discovery.[31] It also permitted more discovery than any state did at the time.[32]

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21. 8 WRIGHT & MILLER, *supra* note 13, § 2001.

22. Subrin, *supra* note 19, at 698–701. *See also* 8 WRIGHT & MILLER, *supra* note 13, §§ 2001–2002; Anderson et al., *supra* note 11, at 765.

23. 8 WRIGHT & MILLER, *supra* note 13, § 2002.

24. Morrow, *supra* note 20, at 1147–48.

25. Anderson et al., *supra* note 11, at 765. During the late nineteenth century, England began to adopt liberal discovery procedures and English courts expanded the attorney-client privilege to include materials prepared for trial; this approach influenced some state courts but "had no impact on the federal courts, which had not yet embraced liberal discovery." *Id.* at 766.

26. Subrin, *supra* note 19, at 692.

27. *Id.*

28. *Id.* at 693.

29. 28 U.S.C. § 2072; Subrin, *supra* note 19, at 691.

30. Subrin, *supra* note 19, at 691.

31. *Id.* at 719; Anderson et al., *supra* note 11, at 766–67.

32. "If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules, but . . . no one state allowed the total panoply of devices" and the FRCP "eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use." 8 WRIGHT & MILLER, *supra* note 13, § 2001. *See also id.*, § 2002 ("Civil Rules 26 to 37 were intended to take the best of what were then modern English and state practices for discovery and make them

Overnight, discovery became the primary means of formulating issues and developing facts.[33] It promoted finding truth and eliminated "the old procedural elements of concealment and surprise."[34] Previously, pretrial inquiry into issues and facts was narrowly confined and cumbersome; but now pleadings and discovery provided means to find facts, and to narrow and clarify issues.[35] "Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[36]

Between the birth of the FRCP in 1938 and the Supreme Court's 1947 decision in *Hickman v. Taylor,* district courts addressed the concept of work product protection but often with little clarity or consistency. In short, the law of this fledging unnamed doctrine was cloudy and inconsistent.[37]

On the one hand, several courts held "matters obtained or prepared as the result of an investigation in anticipation of litigation or in preparation for trial are generally subject to discovery."[38] After all, the FRCP did not protect this material. While some complained the new "hospitality to pre-trial discovery . . . engendered fraud and perjury," there was "perjury and coaching of witnesses in the old days" too.[39] Others saw unfairness when "a lawyer who . . . diligently prepared his case [was] obliged to let counsel for the adversary scrutinize his data."[40] Opponents countered that such unfairness was outweighed by the "much-needed improvement in judicial ascertainment of the 'facts' of cases."[41]

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available in the federal court."); Subrin, *supra* note 19, at 719; Anderson et al., *supra* note 11, at 766–67.

33. Anderson et al., *supra* note 11, at 765.

34. Stark v. American Dredging Co., 3 F.R.D. 300 (E.D. Pa. 1943) (internal quotations and citations omitted). *See also* 8 WRIGHT & MILLER, *supra* note 13, § 2001 (discussing purpose of FRCP); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205–08, 210, 213 (1942-1943) (discussing purpose and new mechanisms of FRCP).

35. Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

36. *Id.* at 501.

37. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment. *See also* Hickman v. Taylor, 153 F. 2d 212, 220 n. 13 (3d Cir. 1945). The Supreme Court would later observe "a great divergence of views among district courts." Hickman, 329 U.S. at 500.

38. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1945). *See also* Anderson et al, *supra* note 11, at 755–56, 767–68, 768 n. 50 (citing cases).

39. Hoffman v. Palmer, 129 F.2d 976, 997 (2d Cir. 1942).

40. *Id.*

41. *Id.*

However, many courts, for various reasons, ruled to the contrary and denied discovery of such information.[42] Some courts barred requests as seeking nonmaterial or hearsay evidence.[43] Others reasoned permitting such discovery would be unfair and would "penalize diligence and put a premium on laziness."[44] Still others denied discovery because the moving party failed to provide a good reason for disclosure, or on the general principle that there is no discovery of another party's case preparation.[45] Yet another group of courts reached the same conclusion without articulating any clear reason.[46] For example, one district court remarked that although it interpreted the FRCP lib-

42. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment. *See* Palmer v. Hoffman, 318 U.S. 109, 114 (1943) (holding statements taken outside regular course of business were inadmissible and writing "It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included").

43. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1945).

44. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1944).

45. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1944). *See also* Anderson et al., *supra* note 11, at 767–71 & nn. 50–75 (1983) (citing cases appealing to the "good cause" requirement in Rule 34 before ordering document production, and other cases interpreting the FRCP to prohibit discovery of such material even though the rules do not explicitly prohibit its discovery); Farr v. Delaware, L. & W.R. Co., 7 F.R.D. 494, 495 (S.D.N.Y. 1944) (permitting production of accident reports made by officers or employees of party "in the regular course of the performance of his duty" but denying discovery of "any statement or other information acquired by or through the direction of counsel after notice of the accident and in furtherance of his preparation for the defense of the action" as "confidential, unless and until the same is presented to the court for examination and a specific ruling made with respect thereto").

46. While Rule 34, which governed motions to produce, contained a requirement that a party show good cause why documents should be produced, many courts protected attorney investigations as a broad limitation on all forms of discovery in the federal rules. *See, e.g.*, Courteau v. Interlake S.S. Co., 1 F.R.D. 525, 526 (W.D. Mich. 1941) (denying motion seeking witness statements taken by defense in preparation for trial as one litigant may not make use of opponent's case preparation "except in the most unusual circumstances"); Piorkowski v. Socony Vacuum Oil Co., 1 F.R.D. 407, 408 (M.D. Pa. 1940) ("While the courts have made every effort to construe the rules for discovery as liberally as possible in order to permit all parties to obtain a full disclosure of the facts pertaining to the case, there have been established certain necessary limitations of the exercise of discovery powers. One of these limitations prevents the securing by one party of the results of the preparation for trial of another party."); Byers Theaters, Inc. v. Murphy, 1 F.R.D. 286, 288–89 (W.D. Va. 1940) ("both law and reason dictate that the scope of interrogatories" and the FRCP "were not intended to be made the vehicle through which one litigant could make use of opponent's preparation of his case."); Floridin Co. v. Attapulgus Clay Co., 26 F. Supp. 968, 973–74 (D. Del. 1939) ("The new Rules of Civil Procedure were not intended to permit a party to pry into the details of the other party's preparation for trial."); McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D.N.Y. 1939) (prohibiting discovery of "affidavits and similar materials secured by the other party by independent investigation incident to the preparation of the case for trial" because while the FRCP were "designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make

erally, it frequently "determine[d] how far a party may go in the examination of a witness" on any non-privileged relevant matter.[47] Yet in the same breath the court confined the ruling "to this particular case lest it might become the practice to conceal information, which might otherwise be obtainable, in the inter-office correspondence file, on the supposition that it would thus not be subject to production."[48]

The absence of a dominant and well-reasoned view[49] caused immense confusion. After surveying district court opinions, the Third Circuit described decisions favoring one outcome as having an "undefined extent and uncertain nature," while decisions reaching the opposite conclusion were "equally cloudy in definition and limited in scope."[50] The absence of any appellate guidance further complicated matters.[51]

1944 witnessed an attempt at clarity by drafting a codified work product rule. The proposed FRCP amendment permitted protective orders to prevent "inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial."[52] It did not provide absolute protection, but rather established the power to deny discovery in certain cases.[53] A second draft in 1945 noted the diverging court views, and explained that the main objection to the 1944 proposal concerned its failure to set a standard on when such protective orders are appropriate.[54] "In apparent despair, the Committee concluded: 'If members of the profession can formulate a general statement of the standard for exercise of discretion, the Committee will welcome it and give it careful consideration.'"[55]

Just seven years after the adoption of the FRCP, a federal district court decided *Hickman v. Taylor*. At that time the term "work product" did not exist.

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use of his opponent's preparation of his case. . . . It is fair to assume that, except in the most unusual circumstances, no such result was intended.")

47. French v. Zalstem-Zalessky, 1 F.R.D. 508, 508–09 (S.D.N.Y. 1940) (concluding defendant did not have to produce "the result of its investigations in preparing for trial").

48. *Id.*

49. *See* 8 WRIGHT & MILLER, *supra* note 13, § 2001 (summarizing various viewpoints); Hickman v. Taylor, 329 U.S. 495, 500 (1947) ("The importance of the problem, which has engendered a great divergence of views among district courts, led us to grant certiorari."); James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 303–07 (1939-1940) (summarizing case law); Morrow, *supra* note 21, at 1152 (reviewing conflicting case law).

50. Hickman v. Taylor, 153 F.2d 212, 221 n.13 (3d Cir. 1945).

51. *See id.* at 214 n. 2.

52. Anderson et al., *supra* note 11, at 772.

53. *Id.*

54. *Id*; 8 WRIGHT & MILLER, *supra* note 13, § 2001.

55. *Id.*

B. The Lineage of Hickman v. Taylor

Five seamen died when a tugboat capsized.[56] Four days later, the tugboat company and its insurance carrier hired Mr. Fortenbaugh, an attorney, to "defend whatever litigation arose from the sinking in [sic] behalf of both the owners of the tug and the underwriters."[57] Fortenbaugh interviewed and took witness statements from four survivors—all employees of the defendant tugboat company—and others with relevant information.[58] In some cases he made interview memoranda.[59]

The plaintiff sued the tugboat company and its owners under federal law for causing her husband's death.[60] She filed an interrogatory under FRCP 33 seeking any statements from crewmembers of the capsized tugboat, or any other vessel "taken in connection with the towing of the car float and the sinking of the Tug."[61] The interrogatory also requested copies of all written witness statements, and the details of any oral statements.[62] Later interrogatories sought the interview memoranda.[63] The defendants objected because the material was "privileged matter obtained in preparation for litigation."[64]

As this case moved through the court system, so too did issues that plagued courts for generations. On its face, the FRCP permitted discovery of this material.[65] Some courts disagreed, but lacked any guidance from a statute, rule, or case law.[66] The name, source, scope, and classification of this infant doctrine were rarely addressed with detail or certainty.

1. District Court Decision

The district court, sitting *en banc*, ordered production of (i) all written witness statements, (ii) the substance of any relevant facts learned through oral witness statements, and (iii) memoranda of witness interviews containing facts.[67] In doing so it highlighted core tenants of what became the work product doctrine.

56. Hickman v. Taylor, 4 F.R.D. 479, 480 (E.D. Pa. 1945).
57. *Id.* at 481.
58. *Id.*
59. *Id.*
60. *Id.* at 480.
61. *Id.*
62. Hickman v. Taylor, 4 F.R.D. 479, 480 (E.D. Pa. 1945).
63. *Id.* at 480–81.
64. *Id.*
65. *See supra* notes 38–41 and accompanying text.
66. *See supra* notes 42–48 and accompanying text.
67. Hickman v. Taylor, 4 F.R.D. 479, 480 (E.D. Pa. 1945).

The district court framed the issue as whether a party "should be required to produce written statements of witnesses and memoranda of oral statements . . . made to the party's attorney."[68] Note that the court did not frame the issue as an interpretation of the FRCP. Indeed, no one contested, nor did the court decide, the propriety of seeking this information under other rules. Rather, the decision applied to all forms of discovery.[69] This framing established both that no particular rule governed the issue (at least not at that time), and that the issue pervaded the entire code.[70]

The court held the decision rested on its discretion, reasoning that the FRCP gives trial courts "the widest discretion" to determine the discoverability of witness statements to an investigating party.[71] The "guiding principle" of this discretion is that the FRCP supports discovery of all relevant matters "to the fullest extent consistent with the orderly and efficient functioning of the judicial process."[72]

The court went on to overturn its prior decision, and instead held it will strongly favor discovery in the absence of compelling reasons to the contrary.[73] "Unless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."[74] Therefore, "even the fact that the chief purpose of taking [the notes] was to prepare for litigation" does not immunize the material from discovery.[75]

But the end of the opinion strikes a different chord. Despite language favoring broad discovery, the court drew a firm distinction between facts and opinions. For oral witness statements, the court ordered disclosures of fact statements, but not opinion statements.[76] For witness interview memoranda, the court ordered their production if they "consist of mere statements of fact" as they are then "in all respects equivalent to unsigned statements by the witnesses and are in no different category than the signed statements."[77] However, the

68. *Id.* at 481.

69. *Id.* at 481.

70. The Court distinguished the issue from the attorney-client privilege: "What has been said has to do with the Court's discretion. The question of privileged communications between attorney and client is another matter and is governed by rules of law." *Id.* at 482.

71. *Id.* at 481.

72. *Id.* (The only limitations are the requirement to show good cause for a deposition and certain discovery would not "promote the administration of justice in the particular case").

73. Hickman v. Taylor, 4 F.R.D. 479, 481 (E.D. Pa. 1945).

74. *Id.* at 482.

75. *Id*.

76. *Id.*

77. *Id.*

court ordered Fortenbaugh to turn over to the court memoranda containing "notations of mental impressions, opinions, legal theories or other collateral matter;" the court would review them and disclose only the portions containing fact statements.[78] It reasoned "[d]iscovery should not be abused to become an instrument for obtaining knowledge of the opponent's theories of the case or the opinions, impressions or the record of mental operations of his attorney. . . . [F]reedom in preparation for trial of a disputed issue under our judicial system contributes to satisfactory results, and there cannot be such freedom without some assurance of privacy within reasonable limits."[79]

2. Third Circuit Decision

Loyal to their convictions, Mr. Fortenbaugh and his clients refused to turn over the documents and were found guilty of criminal contempt.[80] On appeal the Third Circuit, also sitting *en banc*, admitted candidly that the "case tests the limits, if any, of the scope of the discovery procedure under the Federal Rules."[81] The Third Circuit also highlighted other unique difficulties: the FRCP did not "expressly cover" the issue,[82] the district courts were split,[83] and the FRCP Advisory Committee never reached a consensus or formulated a workable standard.[84] Ultimately, the court overturned the district court and held this "work product" material was protected as a public policy extension of the attorney-client privilege.[85]

To reach this holding the court relied on a few premises. First, the FRCP "intended to go far in making information known by one party available to the other."[86] Second, there is no meaningful distinction between oral and written statements.[87] Lastly, the policies of the FRCP bound the courts: "When such a policy has been adopted either by rule-making court or legislature judges should go along with it."[88] Each of these premises supported broad, liberal discovery—the hallmark of the FRCP movement.

78. *Id.* at 482–83.
79. Hickman v. Taylor, 4 F.R.D. 479, 482 (E.D. Pa. 1945).
80. Hickman v. Taylor, 153 F.2d 212, 214 (3d Cir. 1945).
81. *Id.*
82. *Id.* at 220.
83. *Id.*
84. The Committee stated adversary "files and their contents are not absolutely privileged . . . [but cannot] be delved into in every case without restriction." *Id.* at 220 & n.12.
85. *Id.* at 223.
86. Hickman v. Taylor, 153 F.2d 212, 217 (3d Cir. 1945).
87. *Id.* at 219.
88. *Id.*

Despite these premises, the court expressed deep concern over how this issue affected the attorney-client privilege. All discovery rules are subject to and limited by the attorney-client privilege, regardless of whether the rules contain such an express limitation.[89] "[W]e cannot think a rule as old as that of [the attorney-client] privilege is to be lightly thrown overboard."[90] But the testimonial attorney-client privilege did not apply to discovery.[91] Nonetheless, the material at issue indirectly affected the privilege. The court worried that if a lawyer disclosed witness statements made during an investigation and the witness made an inconsistent statement at trial, the lawyer could be called to verify the original statement.[92] Invoking the ethical code, the court cited the "professional tradition" that it is "undesirable" for a lawyer to advocate and testify for a client.[93]

Next the court drew an innovative distinction. Drawing on the English scope of discovery and a handful of district court decisions, the Third Circuit held the term "privilege" as used in the FRCP is broader than the term "privilege" in the law of evidence.[94] Although it was clear the material sought was privileged under the FRCP, the Court struggled to articulate the "phrasing of [its] conclusion."[95] It was wary to announce that an attorney's files are "impregnable," a position that might preclude discovery of evidence a client gives to an attorney.[96] "But here we are dealing with intangible things, the results of the lawyer's use of his tongue, his pen, and his head, for his client. This was talked about as the 'work product of the lawyer' in the argument of the case."[97]

The Third Circuit announced "work product" not as a separate doctrine, but rather as a class of material protected by the discovery-version of the attorney-client privilege. The Court justified "this frank extension of privilege beyond testimonial exclusion" as "a rule of public policy, and the policy is to aid people who have lawsuits and prospective lawsuits."[98] This policy encourages clients to make full disclosures to their attorneys and encourages attorneys to "put their whole-souled efforts" into the case.[99]

89. *Id.* at 221.
90. *Id.*
91. *Id.* at 222.
92. Hickman v. Taylor, 153 F.2d 212, 219–20 (3d Cir. 1945).
93. *Id.* at 220.
94. *Id.* at 222.
95. *Id.* at 222–23.
96. *Id.*
97. *Id.*
98. Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945).
99. *Id.*

The Third Circuit was in a precarious position. The FRCP was an infant. Courts must follow the policies of the FRCP, which favor broad discovery. But here no rule governed. There was no appellate authority and district courts disagreed. The traditional formulation of the attorney-client privilege did not cover work product but there was a grave concern such discovery could indirectly undermine the privilege. So the Court drew upon case law, restatements, advisory committee notes, ethical and evidentiary rules, and English law. While it was clear to the court the sought material warranted protection, it struggled to articulate a standard or basis. Ultimately, it grafted onto the FRCP a common-law style public policy extension of the attorney-client privilege.

3. An Attempted Intervention by the Judicial Conference

A series of very unusual events followed the Third Circuit's December 1945 decision. In April the following year, the Supreme Court denied the petition for a writ of *certiorari*,[100] only to reverse itself and grant a petition for rehearing and a writ of *certiorari* one month later in May 1946.[101] The next month the FRCP Advisory Committee proposed an amendment to Rule 30 codifying work product protection.[102] While acknowledging several cases aligned with the Third Circuit's opinion, the Committee, with one member dissenting, disagreed.[103] It believed the term "privileged" in the FRCP only referred to the testimonial attorney-client privilege and did not extend to work product.[104] The proposed rule read:

> The Court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. No court shall order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.[105]

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100. Hickman v. Taylor, 327 U.S. 808 (1946).

101. Hickman v. Taylor, 328 U.S. 876 (1946).

102. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment.

103. *Id.*

104. *Id*.

105. Morrow, supra note 20, at 1153 & n. 47–48 (1971); 8 WRIGHT & MILLER, *supra* note 13, § 2021 ("This proposal was buttressed by an eight–page note canvassing the relevant authorities.").

Interestingly, the proposal bifurcated the doctrine and created two standards. It offered qualified protection to the "production or inspection" of materials prepared in anticipation of litigation by requiring the moving party to make a showing of unfair prejudice or undue hardship.[106] But it provided absolute protection for materials that reflect "an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of any expert."[107] Although the proposal amended Rule 30, which governed depositions, it applied to all the main discovery mechanisms.[108]

The Supreme Court rejected the proposal. Although the Court did not explain why "it has usually been assumed that the Court preferred not to deal with the problem by rulemaking, but hoped to contribute to a resolution of the controversy by its decision in the Hickman case."[109] On January 13, 1947 the Supreme Court decided *Hickman v. Taylor*.[110] In doing so it chose to create and develop a doctrine through its jurisprudence rather than through a codified rule.

4. Supreme Court Decision

The Supreme Court affirmed the Third Circuit on different grounds, yet never explained its authority to create work product protection. While acknowledging it could decide the case on narrow procedural grounds because the plaintiff sought discovery under the incorrect rule,[111] the Court addressed the broader issue of whether any discovery devices can include "materials collected by an adverse party's counsel in the course of preparation for possible litigation."[112] Again, the issue pervaded the entire FRCP and no single rule governed.

The Court began by reinforcing the FRCP's liberal discovery policy.[113] Nonetheless, "discovery, like all matters of procedure, has ultimate and necessary boundaries"—although the Court never identified the source of these boundaries.[114] Guiding the Court was the effect

106. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment. The committee rejected standards of "fishing expedition," "penalizes the diligent," puts a "premium on laziness," and a broad attorney-client privilege. *Id.*

107. *Id*.

108. *Id*.

109. 8 WRIGHT & MILLER, *supra* note 13, § 2021.

110. Hickman v. Taylor, 329 U.S. 495 (1947).

111. "But, under the circumstances, we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below." *Id.* at 505.

112. *Id.* at 504–05.

113. *Id.* at 507 ("The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.").

114. *Id.* at 507.

an unnecessary intrusion into an attorney's work would have on the profession. The Court emphasized that the plaintiff had other means of obtaining the witness statements, like by obtaining their prior testimony at a public hearing or by deposing the witnesses directly.[115] Thus, there was no showing of necessity or any indication denial of production would unduly prejudice plaintiff or cause "any hardship or injustice."[116] Somewhat summarily, the Court held no discovery rule contemplated the production of such material in these circumstances.[117] However, this bar was "not because the subject matter is privileged or irrelevant."[118] Rather, work product protection "falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims."[119]

This public policy is the regulation of the legal profession; specifically, the role of attorneys and how they can best serve clients. A lawyer is "an officer of the court [ ] bound to work for the advancement of justice" while also protecting client interests.[120] "It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[121] Proper preparation of a case requires assembling information, determining which facts are relevant, preparing legal theories, and planning strategy "without undue and needless interference."[122] The term "work product" covers this kind of work.[123] A contrary rule risks "[i]nefficiency, unfairness, and sharp practices" that would demoralize the legal profession, and "the interests of the clients and the cause of justice would be poorly served."[124]

Nonetheless, work product protection is qualified. "Where relevant and non-privileged facts remain hidden in an attorney's file, and where production of those facts is essential to the preparation of one's

115. *Id.* at 504.

116. Hickman v. Taylor, 329 U.S. 495, 509 (1947).

117. *Id.*

118. *Id.* at 509–10.

119. *Id.* at 510.

120. *Id.*

121. *Id.*

122. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

123. *Id.*

124. *Id.* Justices Jackson and Frankfurter, concurring, focused on the necessity of the doctrine to the legal profession. "The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. *Id.* at 514–15 (Jackson, J., concurring). "It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. . . . But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them." *Id.* at 518.

case, discovery may properly be had."[125] Absolute protection would undermine the FRCP's "liberal ideals."[126] The burden of showing necessity is "implicit in the rules" and rests on the moving party because "the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure."[127] This burden is higher to discover "an attorney's recollection or impressions of oral witness statements.[128]

5. *The Questions and Answers of* Hickman

And so work product was born. *Hickman* answers some questions while leaving others unanswered. For example, the Court affirmed that work product does not fall within the attorney-client privilege and is an issue that affects all civil discovery.[129] With no rule on point, it created work product protection in common law fashion based on "the public policy underlying the orderly prosecution and defense of legal claims."[130]

But the Court did not explain the source of its power to create a new doctrine out of public policy alone. Which power the Court relied upon affects the viability of future modifications to, or even the elimination of, work product protection.

Some language does hint at whether the doctrine can change or evolve, but does not specify how. Parts of *Hickman* suggest work product protection is necessary to the justice system. To start, the

125. *Id.* at 511.

126. Hickman v. Taylor, 329 U.S. 495, 511–12 (1947).

127. *Id.*

128. While a showing of necessity to access written witness statements is possible, an equivalent showing to access oral statements is unlikely though not impossible. "Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production." *Id.* at 513. To force an attorney to testify what he remembers or what he saw fit to write down "could not qualify as evidence" and if used for impeachment or corroboration would make the attorney "much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer." *Id.* But "[i]f there should be a rare situation justifying production of these matters, petitioner's case is not of that type." *Id.*

129. *See supra* note 112.

130. Hickman v. Taylor, 329 U.S. 495, 510 (1947). As Professor Edward Cleary described it "The fact seems to be, however, that the Court was once more trapped by an apparently felt necessity of saving face by refusing to admit that a contingency had arisen which the rules had not foreseen or had dealt with improvidently. A court driven to critical scrutiny of its own rules occupies an ambiguous and embarrassing position, with no escape offered by the usual preference for judicial over legislative wisdom." Edward W. Cleary, Hickman v. Jencks *Jurisprudence of the Adversary System*, 14 VAND. L. REV. 865, 866 (1960-1961).

Court held discovery has "ultimate and necessary boundaries."[131] And "[i]t is essential that a lawyer work with a certain degree of privacy," for that "is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."[132] Even more strongly, the Court wrote "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[133] Such language paints an outer limit to discovery. This language suggests the Court has authority to establish at least some form of work product protection that the other branches of government cannot modify or eliminate.

Yet other *Hickman* language suggests the opposite. There was widespread controversy throughout the profession over the issues raised in *Hickman*.[134] In fact, work product is "one of the most hazy frontiers of the discovery process."[135] "But, until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right . . . we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result."[136] Such statements strongly suggest that either Congress, or the Supreme Court through its rulemaking power, can modify or even eliminate work product protection. Oddly though, shortly before deciding *Hickman*, the Supreme Court rejected a proposed rule.[137]

A close reading of *Hickman* sets up the overlooked conflict at the core of work product: who defines and controls work product? Though most courts and commentators focus only on *Hickman's* definition of work product, the opinion's language outlines the potential for modifications. *Hickman* was an intervention. Strong policies led to *Hickman* because there was no guidance from any other sources. But the Court carefully included noticeable deference to the FRCP and acknowledged the potential for a rule-based override.

131. Hickman v. Taylor, 329 U.S. 495, 507 (1947).
132. *Id.* at 511.
133. *Id.* at 510.
134. *Id.* at 513–14.
135. *Id.*
136. *Id.* at 514.
137. *Supra* notes 102–109 and accompanying text.

C. *The Aftermath of* Hickman v. Taylor

1. *Immediate Response*

Hickman did not settle matters or bring peace to this turbulent area of law. Work product was brand new, with no clear backstory and many moving parts. Disagreement was inevitable. Although designed to simplify procedure, as one judge explained, the FRCP has "been the subject of more interpretive legal literature than almost any branch of the law during my judicial tenure; and more particularly did the case of *Hickman v. Taylor* account for a large part of it—a veritable Pandora's Box!"[138]

The confusion never subsided. Courts did not reach consensus. One significant source of confusion was whether *Hickman* applied to non-attorney work product. Because *Hickman* involved an attorney and emphasized the special role of attorneys in the legal system, many courts limited protection to attorney-created work product.[139] Other courts disagreed, finding "no logical basis" for distinguishing witness statements gathered by non-attorneys for attorneys.[140] Similarly, questions arose about what legal skills triggered protection and whether expert materials received protection.[141]

These questions were the tip of the iceberg. Courts disagreed about the burden of overcoming work product protection.[142] Many courts interpreted *Hickman's* burden to be higher than the "good cause" requirement under Rule 34 to produce documents, while others treated the two standards as equivalent.[143] Others questioned whether protec-

138. Vironi v. Wheeling & Lake Erie Ry. Co., 10 F.R.D. 45 (N.D. Ohio 1950).

139. Anderson et al., *supra* note 11, at 780 & n. 133 (citing cases); FED. R. CIV. P. 26 advisory committee's note to 1970 amendment (citing cases); Cleary, *supra* note 130, 867–69 (discussing cases).

140. Anderson et al., *supra* note 11, at 780 & n.134; FED. R. CIV. P. 26 advisory committee's note to 1970 amendment (citing cases).

141. Morrow, *supra* note 20, at 1157.

142. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment; 8 WRIGHT & MILLER, *supra* note 13, § 2025.

143. Anderson et al., *supra* note 11, at 780–81; FED. R. CIV. P. 26 advisory committee's note to 1970 amendment. *Accord* Morrow, *supra* note 20, at 1157 ("First, Hickman left three 'good cause' burdens to be met before discovery could be used: (1) good cause (relevance) for production of documents under rule 34; (2) good cause (hardship or necessity) to discover ordinary work-product; and (3) good cause (a 'rare case') to discover an attorney's mental impressions-a test which the Court did not even attempt to define. The situation was distressing, as courts in the years after Hickman became confused and equated the good cause for work-product with a showing of relevance, dearly an erroneous interpretation of the meaning of Hickman."). *See also* Notes, *Discovery: Work Product and Good Cause Development Since* Hickman v. Taylor, 36 IND. L.J. 186, 195–200 (1960-1961).

tion applied beyond discovery to trials.[144] Even the FRCP Advisory Committee acknowledged the immense confusion: "Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial."[145]

In part due to these issues, many states otherwise adopting the federal discovery rules drafted their own detailed work product rule to solve the problems left open in *Hickman*.[146] But the federal system was slow to act. For nearly two decades, proposed FRCP amendments in 1953, 1955, and 1967 tried to clarify the burden to overcome work product protection. None succeeded.[147]

Finally, everything changed in 1970. While acknowledging the Supreme Court's 1947 preference to solve the problem by judicial decision rather than by rule, the FRCP Advisory Committee felt "[s]ufficient experience has accumulated" with lower court applications of *Hickman* to warrant a "reappraisal" in the form of a codified rule.[148]

The 1970 amendment created FRCP 26(b)(3), which has not been significantly changed since then, and today reads:

> (3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal the-

144. Edward W. Cleary, *Hickman v. Jencks Jurisprudence of the Adversary System*, 14 VAND. L. REV. 865, 870 (1960-1961).

145. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

146. 8 WRIGHT & MILLER, *supra* note 13, § 2022.

147. Anderson et al., *supra* note 11, at 782–84; Morrow, *supra* note 20, at 1160; 8 WRIGHT & MILLER, *supra* note 13, § 2023.

148. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment. For a history of the 1970 amendments see Morrow, *supra* note 20, at 1157–63.

> ories of a party's attorney or other representative concerning the litigation.[149]

The Rule eliminated confusion by replacing the "good cause" requirement with a "substantial need" and "undue burden" standard. The committee elaborated that "substantial need" requires an assessment of importance, need, and alternative access.[150] The amendment also resolved whose work product was protected by extending protection to non-attorneys.[151]

But at the same time Rule 26 raised many new debates, perhaps even more than it solved. The Rule gave special protection to an attorney's "mental impressions, conclusions, opinions, or legal theories" (sometimes referred to as "opinion" or "core" work product). Yet the rule only protects "tangible things." Was intangible work product still protected? If so, was it subject to a different standard? Commentators disagreed.[152] While *Hickman* "soundly divided the subject into 'ordinary' and 'opinion' work product,"

> Rule 26(b)(3) surprisingly, irrelevantly, and apparently inadvertently divided the same world into "tangible" and "intangible" work product. The rule implicitly recognized that both ordinary and opinion work product, deserving different degrees of protection, could appear in documents and tangible things. The rule left intangible work product on its own.[153]

As one set of commentators noted this "suggested the existence of some ill-defined bifurcation within the rule."[154] Why Rule 26 did not mimic the language of *Hickman* is a question left unanswered. Similarly, what justifies this distinction between tangible and intangible work product? Why is intangible work product left unprotected? These are issues rarely raised and never answered.

The Rule also limited protection to materials prepared "in anticipation of litigation." This created a new and problematic sub-doctrine. When does "anticipation" begin? Does protection extend beyond the anticipated litigation to subsequent litigation?[155] Other issues arose concerning waiver and which parties could assert the protection.[156]

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149. FED. R. CIV. P. 26(b)(3); 8 WRIGHT & MILLER, *supra* note 13, § 2023.

150. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

151. Anderson et al., *supra* note 11, at 782–84.

152. *Id.*

153. Clermont, *supra* note 18, at 756.

154. Anderson et al., *supra* note 11, at 782–84.

155. *Id.* at 784.

156. *Id.*

The 1974 amendments to Rules 16(a)(2) and (b)(2) of the Federal Rules of Criminal Procedure added work product protection in criminal cases. They currently state:

> (a)(2) *Information Not Subject to Disclosure*. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.
>
> . . .
>
> (b)(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
> (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
> (B) a statement made to the defendant, or the defendant's attorney or agent, by:
> (i) the defendant;
> (ii) a government or defense witness; or
> (iii) a prospective government or defense witness.[157]

Yet again, for reasons unknown, work product's allergy to consistency flared. Rule 16's language neither mirrors *Hickman* nor FRCP 26. Unlike its civil counterpart it is "cast in terms of the type of document involved (e.g., report), rather than in terms of the content (e.g., legal theory)."[158] The amendment process rejected altering the language to mirror its civil counterpart.[159]

Thus, the time period after the 1970 and 1974 amendments remained filled with disputes and conflicting opinions.[160] By at least one estimate, work product "is the most frequently litigated discovery issue."[161]

2. Modern Interpretation of the Work Product Doctrine

This Article has tracked work product chronologically to reach conclusions about its source and nature. At this point let us pause and take inventory. Professor Clermont summarized it well:

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157. FED. R. CRIM. P. 16(a)(2); FED. R. CRIM. P. 16(b)(2).

158. FED. R. CRIM. P. 16(a) advisory committee's note to 1974 amendment.

159. *Id.*

160. Anderson et al., *supra* note 11, at 782–84. For a comprehensive study of the dilemmas in applying the codified rules see Anderson et al., *supra* note 11.

161. *Id.* at 763.

> Significant intellectual challenge and truly compelling importance compose the formula for disorder. So many commentators (and judges) wander into the moraine, focus hard but myopically on some tiny facet of the work-product doctrine, and leave a deposit of fresh confusion. One of the contributing causes of this disorder is the questionable legal process that produced the work-product doctrine. In the forties, the Supreme Court passed up the rulemaking route for the pointillist case method, kicking off the process of clarification with the great case of *Hickman v. Taylor*. In 1970, from the welter of conflicting decisions the rulemakers attempted to codify workable sensibleness, adopting the poorly executed Rule 26(b)(3). Today we thus enjoy intensified confusion.[162]

Even putting aside the interpretations of FRCP 26, Federal Rule of Criminal Procedure 16, and *Hickman*, there is a much larger issue. That these Rules and *Hickman* are different in significant ways is well established. Take FRCP 26 as an example: "One of the most significant features of the current work product doctrine is the coexistence of *Hickman* and Rule 26(b)(3)."[163] Some view FRCP 26 as narrower than *Hickman* because it applies only to tangible work product, while *Hickman* also protects intangible work product.[164] But others note FRCP 26 is broader than *Hickman* in that it protects non-attorney work product whereas *Hickman* only discusses attorney work product.[165] Moreover, FRCP 26 is subject to the methods of interpretation that apply to federal rules, whereas *Hickman* is a policy-driven analysis.[166] Yet all survive as governing sources of law.

Commentators conclude that FRCP 26(b)(3) embodies the "partial codification" of *Hickman v. Taylor*.[167] But this is more than academic theory. The Supreme Court has admitted this too: "The 'strong public policy' underlying the work-product doctrine . . . has been *substantially incorporated* in Federal Rule of Civil Procedure 26(b)(3)."[168] Consistently federal courts follow suit, holding Rule 26 "partially" codifies work product protection and *Hickman* governs uncodified intangible work product.[169] Yet no courts have explained why or identi-

162. Clermont, *supra* note 18, at 755–56.

163. Anderson et al., *supra* note 11, at 763.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See, e.g.*, Anderson et al., *supra* note 11, at 762, 784.

168. Upjohn Co. v. United States, 449 U.S. 383, 398 (1981) (emphasis added).

169. 8 WRIGHT & MILLER, *supra* note 13, §§ 2023–24 ("[T]he preexisting protections for intangible work product have continued application despite the 1970 amendment.") (citing cases). *See, e.g.,* United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010) ("Hickman provides work-product protection for intangible work product independent of Rule 26(b)(3)."); *In re* Cendent Corp. Secs. Litig., 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from Hickman that work product protection extends to both tangible and intangible work product."); United States v.

fied authority for ruling as such. After all, *Hickman* instructed it governs "until some rule or statute definitely prescribes otherwise."[170] Now there are rules. So why is *Hickman* still relevant?

Currently there are, effectively, two work product doctrines: a codified branch and a *Hickman* branch. The implications are significant. Consider the question of whether protection extends to a non-party's work product. Rule 26 provides no protection. If that is the only source of work product protection, a non-party must seek a protective order under another provision.[171] But if Rule 26 is a partial codification of *Hickman*, then a court can "continue to apply the *Hickman* policies to resolve questions which the Rule does not address."[172] More fundamentally, which source governs the issue? Do courts look to the Rule, to *Hickman*, or to both?

III. Analysis

Courts, practitioners, and commentators have erred in focusing nearly exclusively on *Hickman* for answers. The decision is only partially instructive. The full spectrum of Supreme Court decisions about work product, coupled with an analysis of federal rulemaking power, provides answers. The *Hickman* work product doctrine is the product of federal courts' inherent rulemaking power and is far more expansive than previously thought. But it is not limitless. If a rule or statute applies, it preempts *Hickman*.

One Tract of Real Property Together With all Bldgs., Improvements, Appurtenances and Fixtures, 95 F.3d 422, 428 n.10 (6th Cir. 1996) ("When applying the work product privilege to such nontangible information, the principles enunciated in Hickman apply, as opposed to Rule 26(b)(3) of the Federal Rules of Civil Procedure, which applies only to 'documents and tangible things.'"); Alexander v. FBI, 192 F.R.D. 12, 17 (D.D.C. 2000) ("To analyze an attorney work-product claim as to intangible work product, courts must look to the caselaw under Hickman v. Taylor . . . and its progeny and not to Fed. R. Civ. P. 26(b)(3), which applies only to 'documents and tangible things.'"); Lopes v. Vieira, 688 F. Supp. 2d 1050, 1069 (E.D. Cal. 2010) ("The work-product privilege was substantially incorporated into F.R.Civ.P. 26(b)(3)(A)."); Byers v. Burleson, 100 F.R.D. 436, 439 n.4 (D.D.C. 1983) (same); *In re* Grand Jury Subpoena (Legal Servs. Ctr.), 615 F. Supp. 958, 963 (D. Mass. 1985) (same); Donovan v. Fitzsimmons, 90 F.R.D. 583, 587 (N.D. Ill. 1981) (same); Loftis v. Amica Mut. Ins. Co., 175 F.R.D. 5, 11 (D. Conn. 1997) (same).

170. Hickman v. Taylor, 329 U.S. 495, 514 (1947).

171. Anderson et al., *supra* note 11, at 861–64.

172. *Id.* at 862.

A. Hickman *Remains Good Law But is Much More Than a Discovery Doctrine*

Despite the confusion rampant within this crucial doctrine, the Supreme Court has rarely discussed *Hickman*.[173] In fact, the Court never squarely addressed the doctrine between *Hickman* and the amendments to FRCP 26 and Federal Rule of Criminal Procedure 16. Some later opinions refer to work product in passing and without elaboration; they simply reaffirm its general definition.[174]

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173. The Supreme Court has used the term "work product" to refer to many different concepts. In many cases the Court uses the term in a more descriptive or colloquial manner referring to the product or output of government entities or professionals. Such cases seem to have no bearing on the work product protection discussed here. *See, e.g.*, Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016) (Ginsburg, J., dissenting) ("the Court erred profoundly in that case by reading the work product of a Congress sitting in 1974 as . . . ."); Mut. Pharm. Co., Inc. v. Bartlett, 133 S. Ct. 2466, 2481 (2013) (Breyer, J., dissenting) ("For another thing, the FDA has set forth its positions only in briefs filed in litigation, not in regulations, interpretations, or similar agency work product."); Alvarez v. Smith, 558 U.S. 87, 99 (2009) (Stevens, J., dissenting) ("the improvidence of our grant provides an additional reason why we should not vacate the work product of our colleagues on the Court of Appeals."); Rapanos v. United States, 547 U.S. 715, 788 (2006) ("Our unanimous decision . . . was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government."); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 76 (2004) (Stevens, J., concurring) ("In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product."); Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 467 (2002) ("If we assume that Senators Rockefeller and Wallop correctly understood their work product, the provision is coherent.") (referring to statements in Congressional Record); Cent. State Univ. v. Am. Asso. of Univ. Professors, 526 U.S. 124, 130 (1999) (Stevens, J., dissenting) (referring to the "work product of faculty members in Ohio's several state universities"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341 (1995) ("[T]he anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment"); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) ("But when our earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 1/2 decades, our duty to respect Congress' work product is strikingly similar to the duty of other federal courts to respect our work product."); Thompson v. Oklahoma, 487 U.S. 815, 821–22 (1988) ("In performing that task, the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases.").

174. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 422 (2006) (involving assistant district attorney's internal memorandum assessing a law enforcement affidavit and concluding "government employees' work product" was not protected speech); Dept. of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 8 (2001) (concluding FOIA provision incorporating civil discovery privileges included "the privilege for attorney work-product and what is sometimes called the 'deliberative process' privilege. Work product protects mental processes of the attorney. . .while deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.") (internal quotations and citations omitted).

Complicating matters, courts have referred to work product using different terms,[175] including "qualified privilege,"[176] "work product privilege,"[177] and "work-product immunity."[178] Courts are clear work product is not an evidentiary privilege,[179] but it may be a form of immunity or a "qualified privilege."[180] While some might dismiss the naming as semantics, its nomenclature is part of the problem. FRCP 26 and Federal Rule of Criminal Procedure 16 address work product in the discovery context. But "immunity" carries connotations of trial protection while "privilege" suggests protection extending throughout all phases of a case. Fortunately, later Supreme Court decisions shed light on its scope.

Decided over two decades after *Hickman*, the 1975 criminal case of *United States v. Nobles* transformed the *Hickman* work product doctrine. In *Nobles*, the defense called one of its investigators to discuss what prosecution witnesses told him.[181] But the trial court conditioned the testimony on disclosure of the investigator's written report, which was work product.[182] Federal Rule of Criminal Procedure 16 protected work product but only applied to pretrial discovery.[183] The Court concluded while work product protection applied, the defense waived this "qualified privilege" when it called the investigator.[184] In doing so, the Court issued its clearest holding on *Hickman* work product.

Nobles explicitly disproved several work product classifications and limits. First, the policies of *Hickman* apply to criminal trials; in fact, "its role in assuring the proper functioning of the criminal justice system is even more vital."[185] Second, the Court identified "core" work

175. *See also* Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 58 n.1 (N.D. Ohio 1953) ("The term, 'work product of the attorney' has been variously characterized a 'privilege,' 'exemption,' or 'immunity.' It matters little what terminology is employed, however, so long as it is understood that the phrase encompasses something apart from confidential communications between client and attorney.").

176. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 183 (1979) ("We have in the past, however, recognized evidentiary privileges in order to protect interests and relationships . . . For example, Hickman v. Taylor, supra, created a qualified privilege for attorneys' work products in part because, without such a privilege, [t]he effect on the legal profession would be demoralizing.") (internal quotations omitted).

177. FTC v. Grolier Inc., 462 U.S. 19 (1983).

178. *Id.* at 24.

179. 8 WRIGHT & MILLER, *supra* note 13, § 2023.

180. *Id.*

181. 422 U.S. 225, 227 (1975).

182. *Id.*at 229.

183. *Id.* at 235–36.

184. *Id.* at 239.

185. *Id.* at 238.

product (impliedly distinguishing "periphery" work product): "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[186] Crucially, the Court defined this "core" without discussing whether such material is tangible or intangible. Third, acknowledging the post-*Hickman* confusion, the Court held protection applies to non-attorneys, noting that "the doctrine is an intensely practical one."[187] *Nobles* thereby disproved those sources that described FRCP 26 as broader than *Hickman* because it applied to non-attorneys.[188] Fourth, the Court held that protection extends beyond discovery to the trial phase of a case (and potentially onward).[189] The driving forces leading to codification thought of work product as a discovery doctrine.[190] No more.[191]

Notably, *Nobles*' context is similar to *Hickman*. Because Federal Rule of Criminal Procedure 16 only covered pretrial discovery, no rule governed the trial issue in *Nobles*. Yet again the Court called upon the public policies of *Hickman*, but again it did not explain its authority to do so.[192] The Court referenced the "federal judiciary's inherent power" to require the prosecution to produce statements of its witnesses to the defense,[193] but never specified its authority to define and expand the *Hickman* work product doctrine.

Nonetheless, the precise scope of *Hickman/Nobles* remains unclear. *FTC v. Grolier Inc.* illustrates the ambiguity of their breadth. In *Grolier*, the Supreme Court held civil work product protection extended beyond the specific litigation the attorney prepared the materials

186. *Id.* at 238.

187. United States v. Nobles, 422 U.S. 225, 238–39 & n.13 (1975).

188. *See supra* note 164.

189. United States v. Nobles, 422 U.S. 225, 239 (1975). *Cf.* Swidler & Berlin v. United States, 524 U.S. 399, 415 (1998) (O'Connor, J., dissenting) (concluding the work product doctrine does not apply "where the material concerns a client who is no longer a potential party to adversarial litigation").

190. In fact, the main dispute raised in the concurring opinion of Justice White is whether *Hickman* is limited to pretrial discovery. United States v. Nobles, 422 U.S. 225, 243 (1975). Justice White described the *Hickman* decision "entirely as one involving the plaintiff's entitlement to pretrial discovery under the new Federal Rules." *Id.* at 244 (White, J., concurring). He concluded the *Hickman* court did not conclude that work product fell within the attorney-client privilege (as the Third Circuit had concluded) because doing so would have prevented work product serving as evidence at trial. *Id.*at 245. Justice White noted Congress passed Rule 26 "which incorporated much of" *Hickman*. *Id.* at 246. He went on to assert the public policy in *Hickman* does not apply, or at least is not nearly as strong, in the evidentiary context. *Id.* at 254.

191. The Court would not "undertake here to delineate the scope of the doctrine at trial." *Id.* at 239.

192. United States v. Nobles, 422 U.S. 225, 236–38 (1975).

193. *Id.* at 231.

for.[194] The Freedom of Information Act required making agency materials available to the public; however, an exception excluded materials not available "by law" to a party in litigation with the agency.[195] The question was "the extent, if any, to which the work product component of [the exemption] applies when the litigation for which the requested documents were generated has been terminated."[196] To reach its conclusion, the Court relied on the text of Rule 26, which protected materials prepared for any litigation "as long as they were prepared by or for a party to the subsequent litigation."[197] "Whatever problems such a construction of Rule 26(b)(3) may engender in the civil discovery area, it provides a satisfactory resolution to the question whether work-product documents are exempt under the FOIA."[198]

Noticeably absent from the majority opinion is any discussion of *Hickman*/*Nobles* policies. One explanation is that because a rule governs there is no need to appeal to public policy. Another explanation is that Rule 26 is broader than the *Hickman/Nobles* doctrine and so these policies did not apply. Yet, concurring, Justice Brennan drew upon these policies: "A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect."[199] Citing *Hickman*, he warned against the "demoralizing effect on the profession," "harm to the interests of the attorney and his client," and the "danger of inefficiency, unfairness, [and] sharp practices."[200]

Nobles extended *Hickman* dramatically, but *Grolier* laid out a potentially important clarification. In light of *Grolier*, a court's first stop may be to carefully assess any codified work product rules or statutory limitations on the doctrine. If those sources do not address the issue, only then does a court look to the public policies of *Hickman*. Still, courts have never endorsed a regimented two-step process and the answer remains unclear.[201]

194. 462 U.S. 19, 28 (1983).
195. *Id.* at 20.
196. *Id.*
197. *Id.* at 25.
198. *Id.* at 25–26 (citations omitted).
199. *Id.* at 29.
200. FTC v. Grolier Inc., 462 U.S. 19, 30–31.
201. In its 1996 decision in *United States v. Armstrong* the Supreme Court held Federal Rule of Criminal Procedure 16(a)(1)(C) "authorizes defendants to examine Government documents material to the preparation of their defense against the Governments case in chief, but not to the preparation of selective-prosecution claims." 517 U.S. 456, 463 (1996). Concurring, Justice Breyer argued the majority inferred a "case in chief" limitation in part because the defense would likely need work product to make its case for a selective-prosecution claim and a different

B. Federal Courts Apply Hickman *Through Their Inherent Power to Create Rules*

The Supreme Court's authority to decide *Hickman/Nobles* is unknown. Also unknown is the authority for federal courts to apply *Hickman* policy considerations to supplement codified rules. The answer is the firmly established, rarely invoked, nebulous inherent powers of federal courts.

1. The Federal Rulemaking Process

The primary way federal rules, like the rules of civil, criminal, and appellate procedure, are created is through a congressional delegation of rulemaking power to the judiciary via the Rules Enabling Act. The Act permits the Supreme Court to create "general rules of practice and procedure and rules of evidence" for cases in federal courts.[202] To assist with the rulemaking process, Congress created the Judicial Conference to draft proposed rules and amendments.[203] Although the Judicial Conference plays a significant practical role, the power to issue new rules remains solely with the Court. The Supreme Court has rejected,[204] modified,[205] and taken no action[206] on proposed rules. The Court must submit all proposed amendments for congressional review. When Congress elects not to intervene, the proposals take effect.[207]

There are several statutory limits on this rulemaking process. First, no proposed rules can "abridge, enlarge or modify any substantive

provision of Rule 16 prevented disclosure of work product. *Id*. at 473. But the work product provision may itself contain an implicit exception as it does not offer absolute protection. *Id*. at 473-74. "Of course, to read the work-product exception as containing some such implicit exception itself represents a departure from the Rule's literal language. But, is it not far easier to believe the Rule's authors intended some such small implicit exception to an exception, consistent with the language and purpose of the Rule, than that they intended the very large exception created by the Court?" *Id.* at 474.

202. 28 U.S.C. § 2072(a) (2012). Congress has also authorized the Supreme Court and all federal courts to create internal "rules for the conduct of their business" (i.e. local rules) so long as such rules are "consistent with Acts of Congress" and rules passed via the Rules Enabling Act. 28 U.S.C. § 2071(a) (2012).

203. 28 U.S.C. § 331 (2012).

204. JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 54, 100 (1977) (court rejected proposed work product rule because of pending case).

205. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1004 (3d ed. 2008) (Supreme Court made changes to first proposed set of the Federal Rules of Civil Procedure); WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES, FEDERAL JUDICIAL CENTER, 13–15, 31 (1981).

206. 4 WRIGHT & MILLER, *supra* note 205, § 1006 (referencing 1955 rule proposals); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993) (Court refused to transmit amendment implicating foreign relations).

207. 28 U.S.C. § 2074(a) (2012).

right."[208] Notably, unlike the attorney-client privilege, the work product doctrine is procedural and thus always governed by federal law even when a federal court decides a case under diversity jurisdiction.[209] Second, if "laws" and a rule conflict, the more recent one prevails.[210] Research revealed no cases deciding whether "laws" includes case law such that a rule supersedes a conflicting court decision (like *Hickman*). Third, any proposed rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[211] Although sometimes referred to as a "qualified privilege," work product is not an evidentiary privilege.[212] But, muddying the waters, Congress, not the Supreme Court, enacted Federal Rule of Evidence 502, which outlines the subject matter waiver of both the attorney-client privilege and work product.[213]

This process assumes Congress controls federal court procedure and may delegate such power to the judiciary. Courts agree that with Congress's power to create inferior courts comes the ability to control the procedure of such courts.[214] As the Supreme Court has explained, "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."[215]

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208. 28 U.S.C. § 2072(a), (b).

209. 8 WRIGHT & MILLER, *supra* note 13, § 2023 ("At least since the adoption of Rule 26(b)(3) in 1970, it has been clear that in federal court the question whether material is protected as work product is governed by federal law even if the case is in federal court solely on grounds of diversity of citizenship."). *See e.g., In re* Powerhouse Licensing, LLC, 441 F.3d 467, 472 (6th Cir. 2006) ("In a diversity case, the court applies federal law to resolve work product claims and state law to resolve attorney-client claims"); Baker v. GM, 209 F.3d 1051, 1053 (8th Cir. 2000) (same); Frontier Refining, Inc. v. Gorman-Rupp Co., 136 F.3d 695, 703 n. 10 (10th Cir. 1998) (same); United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988) ("Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3). . ..").

210. 28 U.S.C. § 2072(b) (2012); United States v. Wilson, 306 F.3d 231, 236 (5th Cir. 2002) (finding rule of appellate procedure abrogates or abolishes conflicting federal statute); United States v. Kim, 298 F.3d 746, 749 (9th Cir. 2002) (same).

211. 28 U.S.C. § 2074(b).

212. 8 WRIGHT & MILLER, *supra* note 13, § 2023.

213. FED R. EVID. 502; Pub. L. No. 110-322, §1(a) (2008).

214. Livingston v. Story, 34 U.S. 632, 656 (1835) ("And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt."); WRIGHT & MILLER, *supra* note 206, § 1001 ("The whole history of federal judicial procedure, the submission of the Federal Rules of Civil Procedure and the amendments thereto to Congress in accordance with the Rules Enabling Act of 1934, and the decisions of the Supreme Court, all are premised on the authority of Congress to make procedural rules and to delegate that power to the Supreme Court.").

215. Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941).

2. *The Equally Well-Established Yet Amorphous Inherent Powers of Federal Courts to Create Rules*

What if the federal rules are silent on an issue? What if neither Congress nor the Supreme Court have used their rulemaking power to address an issue? This was the scenario in *Hickman* and this is where the concept of inherent powers comes into play.

In *Eash v. Riggins Trucking, Inc.*,[216] the Third Circuit explained that federal courts have inherent powers to create procedural rules.[217] "That the Federal courts *have power*, or may *be empowered*, to make rules of procedure for the conduct of litigation has been settled for a century."[218] These inherent powers are "vested in the courts upon their creation" and "not derived from any statute."[219] They range from creating rules regulating attorney conduct to rules for managing a court's docket.[220] Examples include the power to hold people in contempt, dismiss a case for failure to prosecute, reprimand attorneys, and tax costs on appeal.[221] While the use of these powers is rare and rife with "conceptual and definitional problems" that have "bedeviled commentators for years," the *Eash* court identified three distinct types of inherent powers.[222]

One type is an inherent power to create useful rules, the "Useful Rules Power."[223] For example, in *In re Peterson*, the Supreme Court upheld a district court's power to appoint an auditor to assist its understanding of the case despite no rule permitting or preventing the appointment.[224] The Court stated, "at least in the absence of legislation to the contrary" courts have an "inherent power to provide themselves with appropriate instruments required for the performance of their duties."[225] This includes the power to "appoint persons unconnected with the court to aid judges in the performance of specific judi-

216. 757 F.2d. 557 (3d Cir. 1985).

217. *Id.* at 561–62.

218. *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 101 (1962). The number of assertions of inherent power by federal courts led one scholar to note the following: "the only fair question. . .is not whether inherent power exists at all, but rather, what is the scope of such power?" Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 626 (1957).

219. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561 (3d Cir. 1985).

220. *Id.*

221. *Id.* (citing cases).

222. *Id.* at 561–63.

223. *Id.* at 563.

224. *In re* Peterson, 253 U.S. 300, 312–13 (1920).

225. *Id.* at 312.

cial duties."[226] Other examples cited by the *Eash* Court are the power to certify questions to a state court, grant bail in a situation not dealt with by statute, and dismiss a suit under the doctrine of *forum non conveniens*.[227]

Sounding deceptively simple and intuitive, the doctrinal basis and boundaries of this power are less clear. In *In re Peterson* the Supreme Court suggested it is an equitable power. Since "the commencement of our government, [such inherent power] has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners."[228] In fact, exertions of inherent power extend back to the founding of the country. In 1790, the Supreme Court established requirements for attorneys who could appear before it[229] and adopted "the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court . . . ."[230] Similarly, prior to the Federal Rules of Evidence, courts created evidentiary rules in common law fashion.[231]

The key limitation of the Useful Rules Power is that its use cannot contravene legislation.[232] Recall that in *In re Peterson* the Court upheld the appointment of an auditor "at least in the absence of legislation to the contrary."[233] Illustrating this limit is *Alyeska Pipeline Service Co. v. Wilderness Society*,[234] where despite the Court's inherent power to assess attorney's fees it could not do so. The Court held

226. *Id.*

227. Eash v. Riggins Trucking, Inc., 757 F.2d. 557, 564 (3d Cir. 1985). *See also* United States v. Wells, 519 U.S. 482, 505–10 (1997) (Stevens, J., dissenting) (implying a materiality requirement into a federal false statement statute in part because "[w]hen Congress enacted the current version of the law in 1948, a period marked by a spirit of cooperation between Congress and the Federal Judiciary, Congress looked to the courts to play an important role in the lawmaking process by relying on common-law tradition and common sense to fill gaps in the law—even to imply causes of action and remedies that were not set forth in statutory text").

228. *In re* Peterson, 253 U.S. 300, 312–13 (1920). *See also* ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978) (inherent powers are "rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.").

229. Appointment of Justices, 2 U.S. 399, 399 (1790).

230. Hayburn's Case, 2 U.S. 408, 411 (1792).

231. *See, e.g.*, Funk v. United States, 290 U.S. 371, 382 (1933) (federal courts could articulate current common law rules on spousal testimony in the absence of congressional legislation); McNabb v. United States, 318 U.S. 332, 340–41 (1943) (the Court held a criminal confession inadmissible because of a court's inherent power over the creation and maintenance of "civilized standards of procedure and evidence.").

232. Thomas v. Arn, 474 U.S. 140, 148 (1985) ("Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions.").

233. *In re* Peterson, 253 U.S. 300, 312–13 (1920).

234. 421 U.S. 240 (1975).

that federal law created a list of inapplicable exceptions to the general ban on awarding attorney fees, and thus creating a new exception would conflict with congressional policy.[235] Similarly, in *Societe Internationale v. Rogers*, the Court refused to use its inherent power to dismiss a claim for noncompliance with a discovery order because a FRCP provision controlled.[236] Additionally, *Bank of Nova Scotia v. United States* barred federal courts from using their "supervisory power" to circumvent a rule of criminal procedure.[237] Thus, this power is a gap-filling measure. When there is no rule or law on point courts can use their equitable, inherent Useful Rules Power to step in.

But inherent powers exist that do not stem from practicality and do not yield to every law, rule, and policy of another branch of government. A second form of inherent power is the ability to create rules "essential to the administration of justice" and "'absolutely essential' for the functioning of the judiciary" (the "Qualified Essential Rules Power").[238] It is "implied from strict functional necessity" and can be regulated through legislation but may not be "abrogated nor rendered practically inoperative."[239] This type of inherent power permits courts to fine for contempt or to imprison to preserve courtroom order, both of which "are powers which cannot be dispensed within a court, because they are necessary to the exercise of all other[ ] [judicial powers]. . . ."[240] For example, the Supreme Court has noted that the contempt power is inherent in all courts because it is essential to the administration of justice that courts be able to vindicate their own authority without complete dependence on other branches.[241] Without it, "what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."[242] The power to dismiss *sua sponte* for lack of prosecution is also an inherent power of federal

235. *Id.* at 269.

236. 357 U.S. 197, 207 (1958). *See also* Mills v. Bank of United States, 24 U.S. 431, 439–40 (1826) (upholding local rule designed to further justice and save costs in part because it did not interfere with any rules of evidence). *Cf.* Shane v. McNeil, 41 N.W. 166, 168 (Iowa 1889) (legislature enabled judicial conference to make laws but if conference fails to act each court has common law power to make rules that do not conflict with laws or conference's rules).

237. Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) ("We now hold that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).").

238. Eash v. Riggins Trucking, Inc., 757 F.2d. 557, 562–63 (3d Cir. 1985) (quoting Levine v. United States, 362 U.S. 610, 616 (1959)).

239. *Id.* at 562–63.

240. United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812).

241. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795–96 (1987).

242. *Id.* at 796 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911)). *See* Willy v. Coastal Corp., 503 U.S. 131, 132 n.12 (1992) (acknowledging inherent power), *aff'd* Mistretta v. United States, 488 U.S. 361, 392 (1989).

courts, "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[243] One could view the Qualified Essential Rules Power, which is perhaps the most ambiguous of the court's inherent powers, as a limit on legislative authority. Some powers must exist and while Congress can step in and regulate them, some portion of these powers is beyond congressional control and lies exclusively within the province of the judiciary.

The third and most powerful form of inherent power permits federal courts to act in direct contradiction of legislation.[244] According to the *Eash* court, once Congress creates a federal court, that court is vested with the judicial powers of Article III.[245] This "irreducible inherent authority" covers "an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power'" (the "Fundamental Rules Power").[246] Examples of such power are rare,[247] but may include rules that protect against legislation that prevents judges from judging or inhibits "the effective resolution of justiciable controversies."[248] For instance, the Supreme Court protected the independence of the judiciary by banning legislative "rules of decision" because "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power."[249] The dimensions of this power are notoriously unclear, in part because federal courts have rarely, if ever, applied such a power.[250] The boundaries of this power "are not possible to locate

243. Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

244. Eash v. Riggins Trucking, Inc., 757 F.2d. 557, 562 (3d Cir. 1985).

245. U.S. CONST., art. III, § 1. ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (stating Article III Section 1 protects judiciary from other branches and protects litigant rights); Stump v. Sparkman, 435 U.S. 349, 368 (1978) (Stewart, J., dissenting) (judicial independence benefits litigants).

246. Eash v. Riggins Trucking, Inc., 757 F.2d. 557, 562 (3d Cir. 1985).

247. *See* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29–33 (1958) (describing instances in which legislatures might abridge judicial power through rulemaking).

248. *Id.* at 30.

249. United States v. Klein, 80 U.S. 128, 146–47 (1871).

250. Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 43 (2011) ("The third category of cases, in which the Court has found inherent authority to act in an area where Congress has spoken, are the most difficult to reconcile. Nevertheless, even in these cases, the Court has never explicitly claimed a power superior to that of Congress. Instead, the Court has always found that Congress did not foreclose the inherent power at issue.").

with exactitude" and such a power "must be exercised with great restraint and caution." Regardless of the lack of clarity, the Fundamental Rules Power is essential to the separation of powers.[251]

3. *Courts Used Their Inherent Power to Create the* Hickman *Work Product Doctrine*

Although never recognized by courts, *Hickman* falls within the contours of the inherent powers doctrine. *Hickman* (and *Nobles*) arose when no rule or statute governed and compelling policies applied. *Hickman* is based on public policy and not on any statutory or constitutional source. The public policy is "the orderly prosecution and defense of legal claims,"[252] which, like exertions of inherent power, concerns the administration of justice and resolution of cases. The critical question is which type of inherent power the Court used to decide *Hickman*.

Recall the strong language of *Hickman* about the critical roles of the work product doctrine. The Court noted "discovery, like all matters of procedure, has ultimate and necessary boundaries."[253] Plus, "it is essential that a lawyer work with a certain degree of privacy," for that "is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."[254] And "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[255] This language suggests neither rules nor statutes can, in whole or in part, eliminate or curtail work product. Such language supports the use of the Qualified Essential Rules Power or even the Fundamental Rules Power.

But remember, the Court wrote that the public policies in *Hickman* apply "until some rule or statute definitely prescribes otherwise."[256] This concern has been present since the beginning. When the Third Circuit decided *Hickman* it carefully noted courts must abide by policies "adopted either by rule-making court or legislature."[257] Tellingly, in *Nobles* the Supreme Court upheld a waiver of work product protection. Because no codified rule applied, *Nobles* was a public policy ex-

251. Eash v. Riggins Trucking, Inc., 757 F.2d. 557, 562 (3d Cir. 1985).
252. Hickman v. Taylor, 329 U.S. 495, 510 (1947).
253. *Id.* at 507.
254. *Id.* at 510–11.
255. *Id.* at 510.
256. *Id.* at 514.
257. Hickman v. Taylor, 153 F.2d 212, 219 (3d Cir. 1945).

tension of *Hickman*. Yet the Court found waiver was possible. This conclusion suggests countervailing public policies can override work product protection. Discussed more fully below, later Supreme Court decisions also suggest rules and statutes can eliminate or curtail the *Hickman* work product doctrine. These decisions suggest, and this Article concludes, courts are relying on the Useful Rules Power.

Adding weight to this conclusion is Professor Barton's view that Congress's Article I power under the Necessary and Proper Clause, not Article III's Judicial Powers Clause, controls the judiciary's use of inherent powers.[258] After analyzing the Constitution's text and history, and Supreme Court precedent, Professor Barton concluded that "Congress has near plenary authority over the structure and procedure of the federal courts" and "the judiciary has substantial authority to act [only] when Congress has not acted."[259]

C. The Limits of the Hickman *Work Product Doctrine: Rules and Statutes Preempt* Hickman

The *Hickman* work product doctrine likely stems from the Useful Rules Power and thus can be limited and even eliminated by rules and statutes. A preemption analysis involves assessing the public policies underlying *Hickman*. Work product protects attorney preparation and the privacy of attorney mental processes.[260] While these policies undoubtedly are important, they are subject to an override under the separation of powers. In light of the decisions and authorities discussed below, the policies of *Hickman* are not so essential and fundamental to the judicial system so as to withstand editing and modification by the democratically elected legislative and executive branches.

1. Public Policy Opposing Absolute Work Product Protection

Elevating work product protection to a more privileged category covered by either the Qualified Essential Rules or Fundamental Rules Powers creates several problems. First, it alters work product from being a public policy to being a structural component of the judicial system. Such a seismic change would be odd given that work product only arose after a switch to a discovery-based judicial system. Indeed, the doctrine has evolved because of different views on policy. In the beginning the Supreme Court rejected a rule granting expansive

258. Barton, *supra* note 252, at 5, 39.

259. *Id.* at 5–6; *see also* Degen v. United States, 517 U.S. 820, 823 (1996) ("In many instances the inherent powers of the courts may be controlled or overridden by statute or rule.").

260. Anderson et al., *supra* note 11, at 784–85.

power and instead decided *Hickman*. When *Hickman* proved unmanageable the Judicial Conference developed Rules 26(b)(3) and 16. And the choice to have discovery is itself a public policy determination; nothing—other than policy considerations—prevents Congress from choosing a different system or returning to the pre-FRCP era. Unlike individual constitutional rights, structural protections are usually not waivable.[261] Thus, if courts deem work product essential or fundamental to the integrity of the judicial system it would strip from attorneys and clients the discretion to waive protection (which not even the attorney-client privilege does). Such absolute protection raises the ethical issue of whether attorneys are bound to protect the integrity of the judicial system by avoiding waiver even when it may be in the client's best interest to waive protection. Also, currently in certain circumstances an unintentional disclosure can lead to waiver of undisclosed protected material.[262] This exception, and the waiver of protection, conflicts with notions of fundamental or essential protection.

Second, elevating work product to a higher level of protection would compound the problems of an already unwieldy doctrine. If work product plays a core role in the justice system, is its disclosure reversible error? If the trial court erred, or the attorney improperly disclosed work product material (intentionally or unintentionally), how could it not be reversible error if work product is essential to the justice system? Could a court apply a workable standard weighing the effect of such disclosure on the integrity of the judicial system? Would its disclosure support a finding of an unfair trial, denial of due process, or ineffective assistance of counsel? If it is essential or fundamental, can it ever be waived? If so, how do courts determine when such waiver applies and the scope of the waiver? Since its birth courts struggled to define work product and articulate workable standards. This elevation of protection would create a Russian nesting doll of Pandora's boxes.

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261. *See, e.g.*, Freytag v. C.I.R., 501 U.S. 868, 880 (1991) ("Neither Congress nor the Executive can agree to waive [the Appointment Clause's] structural protection."); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986) ("When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 543–44 (9th Cir. 1984) ("The component of the separation of powers rule that protects the integrity of the constitutional structure, as distinct from the component that protects the rights of the litigants, cannot be waived by the parties . . . .")

262. FED. R. EVID. 502(b).

Perhaps the strongest countervailing policy comes from Federal Rule of Evidence 502, which recognizes a subject-matter waiver of undisclosed, otherwise-protected work product. Under the rule, an *intentional* disclosure of work product will waive protection to undisclosed material concerning the same subject matter when "they ought in fairness be considered together."[263] The rule protects undisclosed material from waiver by an *unintentional* disclosure only if the "holder" of the protection "took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error."[264] Crucially, this rule permits the intentional and unintentional acts of attorneys and clients to waive protection of undisclosed protected material. Furthermore, the rule defines "work product protection" as "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."[265] Notably the Rule references both tangible and intangible material. Recall that FRCP 26(b)(3) only applies to tangible material while *Hickman* spoke of tangible and intangible material. This phrasing suggests the phrase "applicable law" refers to protection stemming from both rules and *Hickman*. Thus, the rule permits the acts of attorneys and clients to waive both codified work product and *Hickman* work product protection. Notably, there is no exception for core work product. As a rule of evidence passed by Congress, it establishes federal policy.[266]

2. Preemption of Hickman

Two Supreme Court decisions support the view that rules and statutes can preempt *Hickman*. In 1976 the Supreme Court approved a congressional curtailment of work product protection. *Goldberg v. United States* concerned the Jencks Act, which permitted criminal defendants access to any statements adopted or approved by prosecution witnesses.[267] While such statements might be work product, the Court held they were discoverable under the statute.[268] However, in the same breath, the Court was careful to explain why the Jencks Act did not undermine the public policies of *Hickman*. Specifically, (i) there is no danger an attorney will distort a witness's statements when the witness adopts or approves the attorney's notes, (ii) there is a clear

263. FED. R. EVID. 502(a).
264. FED. R. EVID. 502(b).
265. FED. R. EVID. 502(g)(2).
266. Pub. L. No. 110–322, §1(a) (2008).
267. 425 U.S. 94, 104 (1976).
268. *Id*. at 105–08.

and congressionally recognized purpose of disclosure to impeach witnesses and thus ensure a fair and just criminal trial, (iii) the lawyer is not serving as a witness, and (iv) there is no plausible concern that government attorneys will be called to authenticate their notes or will feel compelled to testify.[269] Nonetheless, the case reflects a statutory override stripping protection of otherwise protected material.

Later, the Supreme Court more explicitly referenced the possibility of a congressional override. Its 1981 decision in *Upjohn Co. v. United States* held work product material gathered by a corporate counsel was immune from an IRS summons. The Court reasoned the summons were "subject to the traditional privileges and limitations" and "[n]othing in the language of the IRS summons provisions or their legislative history *suggests an intent on the part of Congress to preclude application* of the work-product doctrine."[270] *Upjohn* shows courts look to whether Congress has altered work product protection in a particular case, as it did in *Goldberg*.

Both cases support the view that Congress can override work product protection, but neither expands on how much rules and statutes can limit the doctrine, or whether Congress could eliminate the doctrine.

Under the logic of *Goldberg* and *Upjohn* there is a compelling argument that *Hickman* does not supplement FRCP 26 to protect intangible work product. With a rule on point, the Useful Rules Power does not apply. As Professor Clermont argued, within the realm covered by FRCP 26, "the rule preempts *Hickman*" and potentially more narrowly construes the anticipation of litigation requirement.[271] Thus, for certain questions within the scope of the rule, "authoritative answers derive from the rule and not from *Hickman*."[272] While *Hickman's* policies may "inform a reading of the rule," "[n]evertheless, interpreting a rule presents a task jurisprudentially distinct from elaborating a case-law doctrine."[273] Therefore, *Hickman* governs questions raised beyond the scope of FRCP 26, like work product assertions at trial or pertaining to non-parties.[274] By specifically limiting protection to tangible work product, intangible work product is arguably within the policy scope of FRCP 26 but excluded from protection. Thus, like

269. *Id*. at 107.

270. 449 U.S. 383, 399–400 (1981) (emphasis added).

271. Clermont, *supra* note 18, at 757.

272. *Id.*

273. *Id.*

274. *Id.* at 757–58.

the scenario in *Alyeska Pipeline Service Co.*,[275] courts lack the inherent power to contravene the text and policy of the rule.

3. Preemption of Core Work Product Protection

The great battleground is whether a rule or statute can override *Hickman's* protection of core work product. Advocates seeking protection could argue that, unlike the material at issue in *Goldberg* and *Upjohn*, core work product is protected by a stronger form of inherent power, like the Qualified Essential Rules or Fundamental Rules Powers. They would call upon *Hickman's* strong "necessary" and "essential" language.

In *Upjohn*, the Court noted there is a higher burden to obtain work product of oral witness statements for they could reveal an attorney's mental impressions.[276] *Upjohn* recognized that some courts have held no showing of necessity can overcome work product protection of oral witness statements. Other courts grant oral witness statements special but not inalienable protection.[277] Without deciding the issue, the Court appealed to both *Hickman* and FRCP 26:

> As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship. While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.[278]

Thus, *Upjohn* leaves the issue open.

But several sources undermine the notion that core work product can receive absolute protection. *Hickman's* protection of core work product derives from public policy. Recall that the Supreme Court rejected the 1946 proposed work product rule that granted absolute protection to core work product and instead decided *Hickman*.[279] Although rare, courts have permitted discovery of core work product when these policies were not present or contrary policies overrode them.[280] The "necessary" and "essential" language in *Hickman* is best viewed as the Court applying strong language to support the highly

275. 421 U.S. 240 (1975).

276. Upjohn Co. v. United States, 449 U.S. 383, 399 (1981).

277. *Id*. at 401.

278. *Id*. at 401–02.

279. 8 WRIGHT & MILLER, *supra* note 13, § 2026.

280. Morrow, *supra* note 20, at 1162 & 1165 n. 75 (citing examples); 8 WRIGHT & MILLER, *supra* note 13, § 2026 ("[L]ower courts have found such disclosure justified principally where the material is directly at issue, particularly if the lawyer or law firm is a party to the litigation.").

unusual step of ruling on the grounds of public policy. The Court's apprehension seemed to acknowledge it was filling in a gap until a rule applied.

In at least one context several lower courts have suggested a statute or rule could authorize the disclosure of core work product. There is a split amongst courts as to what extent FRCP 26(b)(4) permits disclosure of work product materials related to expert reports. Some say the 1993 FRCP amendments broadened the scope of expert discovery and are "widely interpreted to override work product protections for materials provided to retained expert witnesses" including core work product.[281] Other courts conclude the rule permits disclosure of factual work product and not core work product, but the rule could do so if there was clear language: "For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute."[282] Regardless, what all these courts agree on is that (i) at a minimum FRCP 26(b)(4) overrides factual work product protection and (ii) a rule or statute can override opinion work product.

D. Summary

In light of its origin and history, the *Hickman* work product doctrine stems from the Useful Rules inherent power of courts. While its importance is undeniable, it is not a proper exercise of the Qualified Essential Rules or Fundamental Rules Powers given repeated language from its birth to the present day suggesting rules and statutes can curtail any aspect of protection. Also, advocates can waive its protection, which is inconsistent with something fundamental to the structure of the judicial system.[283] Further, absolute protection would

281. 8 WRIGHT & MILLER, *supra* note 13, § 2031. *See, e.g.,* Karn v. Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996) ("In this Court's view, new Rule 26 and its supporting commentary reveal that the drafters considered the imperfect alignment between 26(b)(3) and 26(b)(4) under the old Rule, and clearly resolved it by providing that the requirements of (a)(2) 'trump' any assertion of work product or privilege."); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 387 (N.D. Cal. 1991) ("For reasons set forth at length below, we hold that, absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product.").

282. Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995); *see, e.g.,* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642–43 (E.D.N.Y. 1997) ("Rule 26(a) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure."); Nexxus Prods. Co. v. CVS New York, Inc., 188 F.R.D. 7, 8–11 (D. Mass. 1999).

283. FED. R. EVID. 502.

favor—rather than balance—the judicial system's interests to the exclusion of client interests. While core work product merits distinction and special protection, modern case law suggests it too is subject to a legislative or rule-based override. Although rare, courts have permitted discovery of core work product or have suggested a willingness to permit such discovery. Thus, the most likely explanation is that *Hickman* work product is the result of the Useful Rules Power and is preempted by any conflicting rule or statute.

IV. Conclusion

With good reason work product has been intensely litigated in courts and thoroughly discussed by advisory committees. Its unique status as a "qualified privilege" that stems from both codified rules and Supreme Court common law justified solely on the grounds of public policy, readily distinguishes it from any other doctrine. But courts, practitioners, and scholars cannot turn away from the inherent complexities of the doctrine, settle for a superficial understanding, and adopt assumptions with questionable foundations. Historically, courts have always acknowledged the need to defer to the legislature on policy decisions about the judicial system. Even the strongest of policies does not alter the separation of powers.

By engaging the doctrine and understanding its history, glimpses of clarity appear. First, the Supreme Court and federal courts created and expanded the *Hickman* work product doctrine through the use of their inherent powers. Second, *Hickman* and its progeny survive despite the codification of the work product doctrine. Third, even in the context of the highly protected realm of core work product, a rule or statute can override the *Hickman* work product doctrine.

The impact of these conclusions can change the course of litigation and trials. Most notably, work product is not as expansive as most courts and practitioners assume. The varying coverage between the codified rules and *Hickman* creates an opening for discovery. At the same time, courts will struggle to rule on this claim. A decision requires explaining the basis for the Supreme Court's decision in *Hickman*. That is an answer courts have no precedent on. If courts agree with this Article, then they will issue a rare, but thorough, ruling about inherent powers. While clarity is certainly needed, it will be difficult to provide concrete analysis using such a nebulous doctrine. Work product is often spoken of as a purely discovery doctrine or a doctrine defined in a subset of a rule. But it is so much more and implicates some of the most challenging and essential parts of a judicial system.

Perhaps the best course is for the Judicial Conference to re-examine the codified rules, which have remained largely unchanged since their inception. The Conference should consider whether the rules should align with one another, and whether the rules should match or exceed the scope of *Hickman*. The Conference should also consider whether there is a need for codified rules about work product protection outside the discovery context.

We have come a long way since the concerns raised in the first days of the FRCP, addressed in *Hickman*, and revisited in the FRCP and criminal rules. But many of the work product issues perplexing courts and practitioners remain.

TAB 8

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Effective December 1, 2017

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress in April 2017; approved by the JCUS and transmitted to the Supreme Court in September 2016

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentifcation that would allow certain electronic evidence to be authenticated by a certifcation of a qualified person in lieu of that person's testimony at trial.	

Effective December 1, 2018

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to CV 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provison similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C).	FRAP 4, 25

Effective December 1, 2018

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limites, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to “supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8

Effective December 1, 2018

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant's initial appearance; revise the rule to refer to "later" rather than "supplemental" filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019

Current Step in REA Process: published for public comment in August 2017; comment period closed February 2018

REA History: approved for publication by the Standing Committee in June 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
BK 2002, 9036	The proposed amendments to Rules 2002(g) and 9036, along with an amendment to Official Form 410 (Proof of Claim), address noticing and service. The amendment to Rule 2002(g) would expand the references to mail to include other means of delivery allowing a creditor to receive notices by email. The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to other persons by electronic means that the person consented to in writing.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply	
2255 R 5	Makes clear that movant has an absolute right to file a reply	

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